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MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

DECEMBER 22, 1919, TO FEBRUARY 27, 1920

RICHARD W. COOPER

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SUPREME COURT.

CHIEF JUSTICE.

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JOHN E. BIRD, ¹ ADRIAN, ...	Dec. 31, 1919
JOSEPH B. MOORE, ² LAPEER, ...	Dec. 31, 1921

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JOSEPH B. MOORE, LAPEER, ...	Dec. 31, 1921
JOSEPH H. STEERE, SAULT STE. MARIE, ...	Dec. 31, 1921
FLAVIUS L. BROOKE, DETROIT, ...	Dec. 31, 1923
GRANT FELLOWS, HUDSON, ...	Dec. 31, 1923
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GEORGE W. CLARK, ⁵ BAD AXE, ...	Dec. 31, 19—
JOHN E. BIRD, ADRIAN, ...	Dec. 31, 1927

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The residences of the judges, given above, are as of the date of their election.

¹To December 31, 1919.

²From January 1, 1920.

³Reappointed December 22, 1919.

⁴Resigned December 30, 1919.

⁵Appointed December 30, 1919.

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RECORDER'S COURT OF DETROIT.

CHARLES T. WILKINS, EDWARD J. JEFFRIES.

SUPERIOR COURT OF GRAND RAPIDS, MAJOR L. DUNHAM.

JUDICIAL CIRCUITS.

COUNTIES.	Circuits.
Alcona	23
Alger	11
Allegan	20
Alpena	26
Antrim	13
Arenac	34
Baraga	12
Barry	5
Bay	18
Benzle	28
Berrien	2
Branch	15
Calhoun	37
Cass	36
Charlevoix	13
Cheboygan	33
Chippewa	11
Clare	21
Clinton	29
Crawford	34
Delta	25
Dickinson	25
Eaton	5
Emmet	33
Genesee	7
Gladwin	34
Gogebic	32
Grand Traverse	13
Gratiot	29
Hillsdale	1
Houghton	12
Huron	24
Ingham	30
Ionia	8
Iosco	23
Iron	25
Isabella	21
Jackson	4
Kalamazoo	9
Kalkaska	28
Kent	17
Keweenaw	12

COUNTIES.	Circuits.
Lake	19
Lapeer	40
Leelanau	13
Lenawee	39
Livingston	35
Luce	11
Mackinac	33
Macomb	16
Manistee	19
Marquette	25
Mason	19
Mecosta	27
Menominee	25
Midland	21
Missaukee	28
Monroe	38
Montcalm	8
Montmorency	26
Muskegon	14
Newaygo	27
Oakland	6
Oceana	14
Ogemaw	34
Ontonagon	32
Osceola	19
Oscoda	28
Otsego	34
Ottawa	20
Presque Isle	26
Roscommon	34
Saginaw	10
St. Clair	31
St. Joseph	15
Sanilac	24
Schoolcraft	11
Shiawassee	35
Tuscola	24
Van Buren	36
Washtenaw	22
Wayne	3
Wexford	28

TABLE OF CASES REPORTED.

	PAGE
Abbott <i>v.</i> Fidelity & Casualty Co.....	679
—— <i>v.</i> Travelers Insurance Co.....	654
Adams Township, Copper Range Co. <i>v.</i>	209
Addison Apartment Co., Folger <i>v.</i>	607
Albright <i>v.</i> Stockhill.....	468
Alexander, Morris <i>v.</i>	387
Allegan Circuit Judge, Grocers, Inc., <i>v.</i>	270
Anderson <i>v.</i> Chicago, Milwaukee & St. Paul Rail- way Co.	424
Auyer, Umphrey <i>v.</i>	276
Babcock, Sherwood <i>v.</i>	536
Battie <i>v.</i> Roth.....	173
Battle Creek, Truitt <i>v.</i>	618
Baxter <i>v.</i> Oakland Circuit Judge.....	600
Beckovsky <i>v.</i> Burton Abstract & Title Co...224,	236
Benjamin <i>v.</i> McGraw	75
Board of Education of the Union School District of the City of Owosso <i>v.</i> Goodrich.....	646
Bollstrom <i>v.</i> Duplex Power Car Co.....	15
Boyes, People, <i>for Use of</i> Ryan, <i>v.</i>	58
Briggs <i>v.</i> Township of Ronald.....	603
Budd, Washtenaw Mutual Fire Insurance Co. <i>v.</i> ..	483
Burton Abstract & Title Co., Beckovsky <i>v.</i> ...224,	236
Byle <i>v.</i> Grand Rapids Blow Pipe & Dust Arrester Co.	638
Byrne, Smith <i>v.</i>	104
Candler <i>v.</i> Heigho.....	115
Carpenter <i>v.</i> Dennison.....	441
Catholic Mutual Benefit Ass'n, Clifford <i>v.</i>	448

	PAGE
Chicago, Milwaukee & St. Paul Railway Co., Anderson <i>v.</i>	424
City of Battle Creek, Truitt <i>v.</i>	618
City of Detroit, MacLachlan <i>v.</i>	188
City of Grand Rapids, Schurtz <i>v.</i>	510
City of Kalamazoo <i>v.</i> Titus	252
City of Sault Ste. Marie, Oscar Daniels Co. <i>v.</i>	363
Clifford <i>v.</i> Catholic Mutual Benefit Ass'n	448
Closser, McBride <i>v.</i>	398
Cobb, Hendricks <i>v.</i>	595
Copper Range Co. <i>v.</i> Adams Township	209
Corning, Ebert <i>v.</i>	219
 Daniels (Oscar) Co. <i>v.</i> City of Sault Ste. Marie ..	 363
De Golia, Veenstra <i>v.</i>	491
De Lorme, Livernash <i>v.</i>	295
Dennison, Carpenter <i>v.</i>	441
Detroit, MacLachlan <i>v.</i>	188
Detroit Chemical Works, Dow Chemical Co. <i>v.</i> ..	157
Detroit, Grand Haven & Milwaukee Railway Co., Peacock <i>v.</i>	403
Detroit United Railway, Goodman <i>v.</i>	279
——, Wilson <i>v.</i>	411
Diamond, Goodman <i>v.</i>	273
Dorr Township, Graves <i>v.</i>	558
Dow Chemical Co. <i>v.</i> Detroit Chemical Works ..	157
Duplex Power Car Co., Bollstrom <i>v.</i>	15
 Eassom, Harrison <i>v.</i>	 685
Ebert <i>v.</i> Corning	219
 Farmers' Mutual Fire Insurance Co. of Kalamazoo County, Phillips <i>v.</i>	 84
Feldman <i>v.</i> Zimmerman	240
Fidelity & Casualty Co., Abbott <i>v.</i>	679
Fidelity & Casualty Co. of New York, Sullivan <i>v.</i> ..	68
Flintoff <i>v.</i> Muskegon Traction & Lighting Co.	527

TABLE OF CASES REPORTED

ix

	PAGE
Flowers v. Wayne Probate Judge.....	199
Folger v. Addison Apartment Co.....	607
Freeman v. Hoag.....	244
Gagush v. 'Hoeft.....	147, 153
Garber v. Town.....	1, 14
Garrison, Spitzley v.....	50
George P. Yost Fur Co., Park Building Co. v....	349
Goodman v. Detroit United Railway.....	279
—— v. Diamond	273
Goodrich, Board of Education of the Union School District of the City of Owosso v.....	646
Grand Rapids Blow Pipe & Dust Arrester Co., Byle v.	638
Grand Rapids, Schurtz v.....	510
Graves v. Township of Dorr.....	558
Grocers, Inc., v. Allegan Circuit Judge.....	270
Gundick v. Gundick.....	34
Hardy v. Pere Marquette Railway Co.....	622
Harrison v. Eassom.....	685
Hassell, People v.....	236
Heigho, Candler v.	115
Hendricks v. Cobb.....	595
Histed, Woolfitt v.....	308
Hoag, Freeman v.....	244
Hoeft, Gagush v.....	147, 153
Horner v. Townsend.....	612
Hyde, Zanley v.....	96
Hyne, Smith v.....	334
Jewell v. Rogers Township.....	318
Jones v. Titus.....	392
Jonescu v. Orlich.....	89
Judson v. Pratt.....	286
Kaczmarek, Krolik v.....	378
Kalamazoo v. Titus.....	252

	PAGE
Kalamazoo Circuit Judge, Kentucky Wagon	
Manfg. Co. v.	267
Kentucky Wagon Manfg. Co. v. Kalamazoo Cir-	
cuit Judge	267
Kirn, Roy v.	571
Krolik v. Kaczmarek.	378
Kyselka v. Northern Assurance Co. of Michigan.	47
 Livernash v. De Lorme.	 295
Lupo, Romeo v.	222
Lupu, People v.	44
 McBride v. Closser	 398
McCormick, Meredith v.	563
McGraw, Benjamin v.	75
MacLachlan v. City of Detroit.	188
McQuinn v. Running.	207
Maloney v. Webber.	41
Martin, People v.	109
May, Zimmerman v.	55
Meredith v. McCormick	563
Michaels v. Pinten.	455
Michigan Railway Co., Rice v'.	123
Michigan State Board of Dental Examiners,	
Thiedemann v.	552
Misner v. Stange.	680
Morris v. Alexander	387
Muskegon Traction & Lighting Co., Flintoff v. .	527
 Northern Assurance Co. of Michigan, Kyselka v. .	 47
 Oakland Circuit Judge, Baxter v.	 600
O'Connor v. Scallen.	417
——, Union Trust Co. v.	417
O'Dell v. Straith	497
Orlich, Jonescu v.	89
Oscar Daniels Co. v. City of Sault Ste. Marie..	363
Owosso Board of Education v. Goodrich.	646

TABLE OF CASES REPORTED.

xi

	PAGE
Park Building Co. <i>v.</i> George P. Yost Fur Co.	349
Parks <i>v.</i> Sherman	697
Peacock <i>v.</i> Detroit, Grand Haven & Milwaukee Railway Co.	403
People <i>v.</i> Hassell.....	236
—— <i>v.</i> Lupu	44
—— <i>v.</i> Martin	109
—— <i>v.</i> Rajona	633
—— <i>v.</i> Williams	586
——, <i>for Use of</i> Ryan, <i>v.</i> Boyes.....	58
Pere Marquette Railway Co., Hardy <i>v.</i>	622
Phillips <i>v.</i> Farmers' Mutual Fire Insurance Co. of Kalamazoo County	84
Pinten, Michaels <i>v.</i>	455
Plainfield Township, Vinton <i>v.</i>	179
Pratt, Judson <i>v.</i>	286
Rajona, People <i>v.</i>	633
Rice <i>v.</i> Michigan Railway Co.....	123
Richards, Vyse <i>v.</i>	383
Rogers Township, Jewell <i>v.</i>	318
Romeo <i>v.</i> Lupo.....	222
Ronald Township, Briggs <i>v.</i>	603
Roth, Battie <i>v.</i>	173
Roy <i>v.</i> Kirn	571
Running, McQuinn <i>v.</i>	207
Ryan, People, <i>for Use of</i> , <i>v.</i> Boyes.....	58
Sault Ste. Marie, Oscar Daniels Co. <i>v.</i>	363
Scallen, O'Connor <i>v.</i>	417
Schurtz <i>v.</i> City of Grand Rapids.....	510
Sherman, Parks <i>v.</i>	697
Sherwood <i>v.</i> Babcock.....	536
Smith <i>v.</i> Byrne.....	104
—— <i>v.</i> Hyne	334
Spitzley <i>v.</i> Garrison.....	50
Stange, Misner <i>v.</i>	680
Stockhill, Albright <i>v.</i>	468

	PAGE
Straith, O'Dell <i>v.</i>	497
Sullivan <i>v.</i> Fidelity & Casualty Co. of New York.	68
Thiedemann <i>v.</i> Michigan State Board of Dental	
Examiners	552
Titus, City of Kalamazoo <i>v.</i>	252
——, Jones <i>v.</i>	392
Town, Garber <i>v.</i>	1, 14
Townsend, Horner <i>v.</i>	612
Township of Adams, Copper Range Co. <i>v.</i>	209
Township of Dorr, Graves <i>v.</i>	558
Township of Plainfield, Vinton <i>v.</i>	179
Township of Rogers, Jewell <i>v.</i>	318
Township of Ronald, Briggs <i>v.</i>	603
Travelers Insurance Co., Abbott <i>v.</i>	654
Truitt <i>v.</i> City of Battle Creek.....	618
Umphey <i>v.</i> Ayer	276
Union Trust Co. <i>v.</i> O'Connor.....	417
Veenstra <i>v.</i> De Golia.....	491
Vinton <i>v.</i> Township of Plainfield.....	179
Vyse <i>v.</i> Richards	383
Washtenaw Mutual Fire Insurance Co. <i>v.</i> Budd..	483
Wayne Probate Judge, Flowers <i>v.</i>	199
Webber, Maloney <i>v.</i>	41
Williams, People <i>v.</i>	586
Wilson <i>v.</i> Detroit United Railway.....	411
Woolfitt <i>v.</i> Histed	308
Yost (George P.) Fur Co., Park Building Co. <i>v.</i> ..	349
Zanley <i>v.</i> Hyde.....	96
Zimmerman, Feldman <i>v.</i>	240
—— <i>v.</i> May	55

87 CASES.

TABLE OF CASES CITED.

	PAGE
Abbott v. Insurance Co., 208 Mich. 654.....	679
Ackerman v. Railroad Co., 143 Mich. 58.....	409
Adams v. Fisher, 143 Mich. 673.....	313
Ætna Life Ins. Co. v. Bethel, 140 Ky. 609.....	666
Albrecht v. Annuity Ass'n, 129 Mich. 444.....	450
Aldine Manfg. Co. v. Barnard, 84 Mich. 632.....	390
Althouse v. McMillan, 132 Mich. 145.....	165
Ancient Order United Workmen v. Moore, 1 Ky. L. R. 93..	452
Anderson v. Wartenberg, 196 Mich. 529.....	242
Andrews v. Tamarack Mining Co., 114 Mich. 375.....	93
Attorney General v. Railway Co., 149 Mich. 122.....	386
Auditor General v. Jenkinson, 90 Mich. 523.....	217
—— v. Pioneer Iron Co., 123 Mich. 521.....	217
—— v. Prescott, 94 Mich. 190.....	217
Aurora Iron Mining Co. v. City of Ironwood, 119 Mich. 325..	216
Avery v. Thompson, 117 Me. 120.....	582
 Bacon v. Railroad Co., 66 Mich. 166.....	 101
Baker v. Close, 204 N. Y. 92.....	83
Baltimore & Ohio R. Co. v. Pitcairn Coal Co., 215 U. S. 481..	429
Bank v. Ward, 100 U. S. 195.....	227
Bayne v. Everham, 197 Mich. 181.....	140
Beard v. Klusmeyer, 158 Ky. 153.....	583
Benjamin v. Life Ass'n, 146 Cal. 34.....	453
Bennett v. Beam, 42 Mich. 346.....	154
—— v. Hickey, 110 Mich. 628.....	683
Berger v. Roe, 179 Mich. 184.....	445
Beunk v. Valley City Desk Co., 128 Mich. 562.....	94
Beuthien v. Dillon, 160 Mich. 396.....	400
Biensteadt v. Clinton Circuit Judge, 142 Mich. 633.....	269
Binder v. Accident Ass'n, 127 Iowa, 25.....	668
Blackwood v. Van Vleet, 11 Mich. 252.....	445
Board of Education of Traverse City v. Straub, 182 Mich. 665	 649
Boardman v. Willard, 73 Iowa, 20.....	315
Bohaker v. Insurance Co., 215 Mass. 32.....	678
Bollstrom v. Duplex Power Car Co., 208 Mich. 15.....	2
Bolton v. Cummins, 200 Mich. 234.....	447
Brady v. Benevolent Ass'n, 14 N. Y. Supp. 272.....	451
Briggs v. Milburn, 40 Mich. 512.....	386
Brooks v. Cook, 44 Mich. 617.....	359
Brott v. Railroad Co., 220 N. Y. 92.....	137
Brown v. A. F. Bartlett & Co., 201 Mich. 268.....	66
Bryant v. Pullman Co., 188 App. Div. 311.....	408
Budd v. Railroad Co., 200 Mich. 250.....	485

	PAGE
Burden <i>v.</i> Thayer, 3 Metc. (Mass.) 76.....	358
Burdeno <i>v.</i> Amperse, 14 Mich. 91.....	314
Burgard <i>v.</i> Burgard, 175 Mich. 565.....	269
Burridge <i>v.</i> City of Detroit, 117 Mich. 557.....	195
Burtch <i>v.</i> Child-Hulswit & Co., 207 Mich. 205.....	674
Burton <i>v.</i> Koch, 184 Mich. 250.....	651
Buxton <i>v.</i> Jones, 120 Mich. 522.....	479
Cadillac Machine Co. <i>v.</i> Iron Co., 205 Mich. 107.....	169
Caille Bros. Co. <i>v.</i> Saginaw Circuit Judge, 155 Mich. 480....	269
Calder <i>v.</i> Michigan, 218 U. S. 591.....	513
Canfield <i>v.</i> City of Jackson, 112 Mich. 120.....	466, 585
Capper <i>v.</i> Paper Co., 86 Kan. 355.....	170
Carpenter <i>v.</i> Judge of Superior Court, 126 Mich. 8.....	269
Carroll <i>v.</i> Rice, Walk. Ch. 373.....	481
Castle <i>v.</i> Railway Co. (S. C.) 99 S. E. 846.....	408
Cavanaugh <i>v.</i> Railway Co., 175 Mich. 161.....	535
Champlain <i>v.</i> McCrea, 165 N. Y. 264.....	525
Chandler <i>v.</i> Graham, 123 Mich. 327.....	445
Chicago, etc., R. Co. <i>v.</i> Babcock, 204 U. S. 585.....	217
— <i>v.</i> McGlinn, 114 U. S. 542.....	371
Citizens' Bank of Tifton <i>v.</i> Timmons, 15 Ga. App. 815....	677
City of Detroit <i>v.</i> Railway Co., 172 Mich. 136.....	260
City of Indianapolis <i>v.</i> Trust Co., 75 C. C. A. 442.....	525
City of Kalamazoo <i>v.</i> Kalamazoo Circuit Judge, 200 Mich. 146	260
City of Muskegon <i>v.</i> Boyce, 123 Mich. 539.....	216
Clark <i>v.</i> Traveling Men's Ass'n, 156 Iowa, 201.....	451
Closser <i>v.</i> McBride, 182 Mich. 594.....	399
Clothier <i>v.</i> Miller, 173 Mich. 530.....	400
Codman <i>v.</i> American Piano Co., 229 Mass. 285.....	354
Coffey <i>v.</i> McGahey, 181 Mich. 225.....	476
Collins <i>v.</i> Casualty Co., 224 Mass. 327.....	678
— <i>v.</i> Jackson, 54 Mich. 186.....	479
Columbian Relief Fund Ass'n <i>v.</i> Hopper, 24 Ind. App. 169..	451
Commercial Travelers Mutual Accident Ass'n <i>v.</i> Fulton, 24 C. C. A. 654.....	666
Conkling <i>v.</i> Village of Mackinaw City, 120 Mich. 67.....	195
Conley <i>v.</i> Sinclair, 163 Mich. 306.....	444
Connor <i>v.</i> City of Marshfield, 128 Wis. 280.....	525
Continental Casualty Co. <i>v.</i> Lloyd, 165 Ind. 52.....	675
Cook <i>v.</i> Wayne Circuit Judge, 197 Mich. 19.....	269
Cook Land, etc., Co. <i>v.</i> McDonald, 155 Mich. 175.....	402
Corrigan <i>v.</i> Hinkley, 125 Mich. 125.....	402
Covenant Mutual Life Ass'n <i>v.</i> Tuttle, 87 Ill. App. 309.....	453
Crawford <i>v.</i> Cicotte, 186 Mich. 272.....	598
Crawl <i>v.</i> Dancer, 180 Mich. 607.....	509
Crosby <i>v.</i> City of Greenville, 183 Mich. 452.....	195
Crow, State, <i>ex rel.</i> , <i>v.</i> City of St. Louis, 169 Mo. 31.....	525
Dale <i>v.</i> Turner, 34 Mich. 405.....	444
Davis <i>v.</i> Strobridge, 44 Mich. 157.....	691
Defreese <i>v.</i> Lake, 109 Mich. 415.....	621
Detroit <i>v.</i> Railway Co., 172 Mich. 136.....	260

TABLE OF CASES CITED.

xv

	PAGE
<i>Devaux v. City of Detroit</i> , Harr. Ch. 98.....	445
<i>Dickinson v. Wright</i> , 56 Mich. 42.....	691
<i>Diebel v. Construction Co.</i> , 207 Mich. 618.....	645
<i>Dompier v. Lewis</i> , 131 Mich. 144.....	94
<i>Druck v. Antrim Lime Co.</i> , 177 Mich. 364.....	509
<i>Duggans v. Life Ass'n</i> , 87 Ill. App. 415.....	453
<i>Durfee v. Abbott</i> , 61 Mich. 471.....	301
<i>Eastern Railway Co. v. Littlefield</i> , 237 U. S. 140.....	433
<i>Edward Thompson Co. v. Vacheron</i> , 125 N. Y. Supp. 939....	170
<i>Edwards v. Foote</i> , 129 Mich. 121.....	466
<i>Elliott v. Grand Lodge</i> , 2 Kan. App. 430.....	451
<i>Equitable Building & Loan Ass'n v. Trust Co.</i> , 118 Tenn. 678	227
<i>Erwin v. Harris</i> , 87 Ga. 333.....	165
<i>Everts v. Everts</i> , 80 Mich. 222.....	314
<i>Farrar v. Lonsby Lumber & Coal Co.</i> , 149 Mich. 118....	381, 475
<i>Farrell v. Haze</i> , 157 Mich. 374.....	550
<i>Feldman v. Railway</i> , 162 Mich. 486.....	533
<i>Ferris v. Quimby</i> , 41 Mich. 202.....	390
<i>Fetter v. Casualty Co.</i> , 174 Mo. 256.....	676
<i>Fidelity & Casualty Co. v. Meyer</i> , 106 Ark. 91.....	678
<i>Fike v. Railroad Co.</i> , 174 Mich. 167.....	532
<i>First National Bank v. Steel</i> , 136 Mich. 588.....	386
— <i>v. Union Trust Co.</i> , 158 Mich. 94.....	466
<i>Fishleigh v. Railway</i> , 205 Mich. 145.....	415, 508
<i>Fitzjarrell v. Boyd</i> , 123 Md. 497.....	583
<i>Fletcher Paper Co. v. City of Alpena</i> , 160 Mich. 462.....	217
<i>Fogel v. Brubaker</i> , 122 Pa. St. 7.....	165
<i>Forest Township v. American Bonding Co.</i> , 180 Mich. 90...	386
<i>Fort v. Legion of Honor</i> , 146 Iowa, 183.....	453
<i>Fort Leavenworth R. Co. v. Lowe</i> , 114 U. S. 525.....	371
<i>Fox v. Barrett's Estate</i> , 117 Mich. 162.....	95
<i>Fraternal Aid Ass'n v. Powers</i> , 67 Kan. 420.....	451
<i>Freeman v. Accident Ass'n</i> , 156 Mass. 351.....	676
<i>Frohlich v. Deacon</i> , 181 Mich. 255.....	121
<i>Gagush v. Hoeft</i> , 198 Mich. 263.....	149
<i>Garber v. Town</i> , 208 Mich. 1.....	17
<i>Georgia, etc., R. Co. v. Tapley</i> , 144 Ga. 453.....	137
<i>Germain v. Loud</i> , 189 Mich. 38.....	166
<i>German Alliance Ins. Co. v. Home Water Supply Co.</i> , 226 U. S. 220	227
<i>G. F. Sanborn Co. v. Alston</i> , 153 Mich. 456.....	401
<i>Gillett v. Traction Co.</i> , 205 Mich. 410.....	632
<i>Girard Life Ins. Co. v. Mutual Life Ins. Co.</i> , 97 Pa. St. 15..	451
<i>Gooding v. Underwood</i> , 89 Mich. 187.....	26
<i>Gowan v. McAdoo (Minn.)</i> , 173 N. W. 440.....	408
<i>Grand Trunk, etc., R. Co. v. Fuller</i> , 205 Mich. 486.....	444
<i>Great Falls, etc., R. Co. v. Hammerly</i> , 40 App. Cas. D. C. 196	133
<i>Gunn v. Gunn</i> , 205 Mich. 198.....	386
<i>Guthrie v. Leelanau Circuit Judge</i> , 197 Mich. 321.....	681

	PAGE
Hall v. Assurance Corp., 16 Ga. App. 66.....	676
—— v. People, 47 Mich. 636.....	45, 114
Hammer v. Martin, 205 Mich. 359.....	479
Harshman v. Winterbottom, 123 U. S. 215.....	227
Hartz (J. F.) Co. v. Lukaszewski, 200 Mich. 230.....	447
Hatcher & Snyder v. Railway Co., 258 Fed. 952.....	408
Haubert v. Railroad Co., 259 Fed. 361.....	408
Hawkins v. Railroad Co., 17 Mich. 57.....	359
Highland v. Township of Garfield, 168 Mich. 538.....	187
Hill v. Town, 172 Mich. 508.....	2, 17
Hubbard v. Accident Ass'n, 98 Fed. 930.....	666
—— v. Insurance Co., 98 Fed. 932.....	666
Illinois Cent. R. Co. v. Coal & Coke Co., 150 Ky. 489.....	439
—— v. Dupree, 34 L. R. A. (N. S.) 645.....	535
—— v. Mulberry Coal Co., 238 U. S. 275.....	433
Illinois Commercial Men's Ass'n v. Parks, 103 C. C. A. 286..	666
Illinois Glass Co. v. Horse-Radish Co., 166 Mich. 520.....	166
Indianapolis v. Trust Co., 75 C. C. A. 442.....	525
In re Joseph, 206 Mich. 659.....	270
—— McIntyre's Estate, 160 Mich. 117.....	142
Island Mill Lumber Co. v. City of Alpena, 176 Mich. 575..	216
Jackson v. Hopperton, 16 C. B. (N. S.) 111 E. C. L. 829....	103
Jacobs v. Insurance Co., 183 Mich. 512.....	657
—— v. Jacobs, 141 La. 272.....	584
Jenkins v. Collard, 145 U. S. 546.....	409
Jensen v. Railroad Co., 255 Fed. 795.....	408
J. F. Hartz Co. v. Lukaszewski, 200 Mich. 230.....	447
Jiroch v. Insurance Co., 145 Mich. 375.....	671
John Schwyer & Co. v. Mellon, 196 Mich. 590.....	397
Johnson v. McAdoo, 257 Fed. 757.....	408
Jones v. City of Detroit, 171 Mich. 608.....	185
Joseph, In re, 206 Mich. 659.....	270
Kalamazoo v. Kalamazoo Circuit Judge, 200 Mich. 146.....	260
Kelly v. Emery, 75 Mich. 147.....	187
—— v. Freedman, 56 Mich. 321.....	674
Kentucky Wagon Manfg. Co. v. Kalamazoo Circuit Judge, 208 Mich. 267.....	272
Kimball v. Cotting, 229 Mass. 541.....	355
Kimble v. Gillard, 177 Mich. 250.....	121
Kingsbury v. Kingsbury, 20 Mich. 215.....	40
Knapp v. Railway Co., 114 Mich. 199.....	187
Knight v. Supreme Council, 6 N. Y. Supp. 427.....	451
Knights Templars Indemnity Co. v. Vail, 206 Ill. 404.....	451
Kotzke v. Kotzke's Estate, 205 Mich. 184.....	304
Kraft v. Kraft, 102 Mich. 439.....	606
Krouse v. Railway, 170 Mich. 438.....	332
Kuppenheimer v. Wertheimer, 107 Mich. 77.....	165
Kuschinsky v. Flanigan, 170 Mich. 245.....	569
Lake Shore, etc., R. Co. v. Miller, 25 Mich. 274.....	631
Lambeck v. Railroad Co. 106 Mich. 512.....	535

TABLE OF CASES CITED.

xvii

	PAGE
Lambton Loan & Investment Co. v. Adams, 132 Mich. 350..	224
Lansing Iron & Engine Works v. Wilbur, 111 Mich. 413....	390
Lavalle v. Railway Co. (Minn.), 172 N. W. 918.....	408
Lefevre v. Chamberlain, 228 Mass. 294.....	481
LeRoy v. Collins, 165 Mich. 380.....	54
Lewis v. Detroit Board of Education, 139 Mich. 306.....	556
Lewless v. Railway Co., 65 Mich. 292.....	19
Lickleider v. Traveling Men's Ass'n (Iowa), 166 N. W. 363..	678
Livingston v. Bradford, 115 Mich. 140.....	104
Livingstone (The), 65 C. C. A. 610.....	489
—, 194 U. S. 637.....	490
Loomis v. Railroad Co., 240 U. S. 43.....	429
Loose v. Township of Deerfield, 187 Mich. 206.....	187
Love v. Railroad Co., 170 Mich. 1.....	533
Luka v. Lowrie, 171 Mich. 122.....	550
Lum v. Fairbanks, 155 Mich. 23.....	682
Lumbert v. Prince, 203 Mich. 242.....	508
Lydman v. DeHaas, 185 Mich. 128.....	347
Lynch v. Fisk Rubber Co., 209 Mass. 16.....	83
Lyon v. Insurance Co., 55 Mich. 141.....	453
Mabley v. Kittleberger, 37 Mich. 360.....	93
McArthur v. City of Cheboygan, 156 Mich. 152.....	195
McBride v. Chippewa Circuit Judge, 202 Mich. 61.....	399
McCormick v. Kistler, 175 Mich. 422.....	482
McGregor v. Railway Co. (N. Dak.), 172 N. W. 841.....	408
McIntyre v. Township of Grant, 206 Mich. 223.....	187
McIntyre's Estate, <i>In re</i> , 160 Mich. 117.....	142
McKormick v. City of West Bay City, 110 Mich. 265.....	416
McMorran Milling Co. v. C. H. Little Co., 201 Mich. 301....	409
Mallory v. Ferguson, 50 Kan. 685.....	227
Manwaring v. Jenlson, 61 Mich. 117.....	390
Mardis v. Hines, 258 Fed. 945.....	408
Marshall v. Railroad Co., 184 Mich. 601.....	141
Martin v. Fisher, 143 Mich. 462.....	416
— v. Wayne Circuit Judge, 111 Mich. 71.....	601
Maryland Casualty Co. v. Morrow, 130 C. C. A. 179.....	666
Massaletti v. Fitzroy, 228 Mass. 487.....	583
Mayberry v. Sivey, 18 Kan. 291.....	583
Meagher v. Cowing, 149 Mich. 416.....	166
Merrill v. Allen, 38 Mich. 487.....	481
— v. Humphrey, 24 Mich. 170.....	217
— v. Wilson, 66 Mich. 232.....	481
Methodist Church of Newark v. Clark, 41 Mich. 730.....	445
Michigan Cent. R. Co. v. Coleman, 28 Mich. 440.....	93
Michigan Insurance Co. v. Whittemore, 12 Mich. 311.....	39
Miller v. Johnson, 201 Mich. 535.....	447
— v. Railway, 200 Mich. 388.....	632
— v. Toles, 183 Mich. 252.....	550
Mink v. Railway Co., 194 Mich. 324.....	332
Misner v. Stange, 203 Mich. 411.....	681
Mitchell Coal & Coke Co. v. Railroad Co., 230 U. S. 247....	429
Mollica v. Railroad Co., 170 Mich. 96.....	533
Monaghan v. Insurance Co., 53 Mich. 238.....	230

	PAGE
Moody v. Macomber, 158 Mich. 209.....	445
Moon v. Commercial Travelers, 96 Neb. 65.....	678
Moran v. Palmer, 13 Mich. 367.....	445
Morrisdale Coal Co. v. Railroad Co., 230 U. S. 304.....	429
Morrison v. Carpenter, 179 Mich. 207.....	551
Munn v. Telephone Co., 206 Mich. 201.....	348
Munroe, Boyce & Co. v. Ward, 207 Mich. 369.....	447, 683
Murphy v. Railway Co., 107 Mich. 627.....	535
Murray v. Rugg, 116 Mich. 519.....	26
Muskegon v. Boyce, 123 Mich. 539.....	216
Musselman Grocer Co. v. Kidd, Dater & Price Co., 151 Mich. 478	381, 476
National Ass'n of Railway Postal Clerks v. Scott, 83 C. C. A. 652	666
National Masonic Accident Ass'n v. Shryock, 20 C. C. A. 3..	665
Newberry v. City of Detroit, 184 Mich. 188.....	195
Newport Mining Co. v. City of Ironwood, 185 Mich. 685..	217
Nichol v. Ward, 156 Mich. 136.....	374
Nichols v. Houghton Circuit Judge, 185 Mich. 654.....	115
Nolan v. Garrison, 151 Mich. 138.....	51
North of England Iron S. S. Ins. Ass'n v. Armstrong, L. R. 5 Q. B. 244.....	489
Northern Pacific R. Co. v. North Dakota, 250 U. S. 135....	406
—— v. Solum, 247 U. S. 477.....	429
Nowicki v. Kopelczak, 195 Mich. 678.....	569
Oliver v. Oliver, 118 Ga. 362.....	33
Olsen v. Williams, 172 Mich. 316.....	444
—— v. ———, 172 Mich. 316, 185 Mich. 294.....	400
Ostrum v. Potter, 71 Mich. 44.....	43
Owens v. Auditor General, 147 Mich. 683.....	400
Pachuczynski v. Railway, 202 Mich. 594.....	509
Pagenkoff v. Insurance Co., 197 Mich. 166.....	385
Paine v. Boynton, 124 Mich. 194.....	315
Palmer v. Bray, 136 Mich. 85.....	230
—— v. Sharp, 112 Mich. 420.....	709
Parker v. Armstrong, 55 Mich. 176.....	121
Parnell v. Pungs, 190 Mich. 638.....	674
Patnode v. Foote, 153 App. Div. 494.....	583
Patterson v. Railway Co., 54 Mich. 91.....	93
—— v. Wagner, 204 Mich. 593.....	82
Pelky v. Palmer, 109 Mich. 561.....	550
Penn v. Insurance Co., 160 N. C. 399.....	666
Pennsylvania R. Co. v. International Coal Co., 230 U. S. 184..	429
—— v. Puritan Coal Co., 237 U. S. 121.....	431
—— v. Sonman Coal Co., 242 U. S. 120.....	429
People v. Abbott, 97 Mich. 484.....	45, 114
—— v. Ayres, 195 Mich. 274.....	115
—— v. Brown, 53 Mich. 531.....	591
—— v. Calder, 153 Mich. 724.....	513
—— v. Cismadija, 167 Mich. 215.....	591
—— v. Courier, 79 Mich. 366.....	45

TABLE OF CASES CITED.

xix

	PAGE
People v. Durham, 170 Mich. 598.....	45
— v. Finley, 38 Mich. 482.....	591
— v. Graney, 91 Mich. 646.....	594
— v. Hansen, 183 Mich. 565.....	674
— v. Howard, 50 Mich. 239.....	591
— v. Hurlbut, 24 Mich. 44.....	262
— v. McArron, 121 Mich. 1.....	592
— v. Miller, 96 Mich. 119.....	114
— v. O'Brien, 92 Mich. 17.....	113
— v. Ostrander, 110 Mich. 60.....	594
— v. Partridge, 86 Mich. 243.....	114
— v. Prinz, 148 Mich. 308.....	390
— v. Rice, 206 Mich. 644.....	635
— v. Rivers, 147 Mich. 643.....	114
— v. Rogulski, 181 Mich. 481.....	595
— v. Ryno, 148 Mich. 137.....	114
— v. Sheehan, 118 Mich. 539.....	165
— v. Smith, 92 Mich. 10.....	594
— v. Smolkiewicz, 206 Mich. 1.....	595, 637
— v. Wheaton, 207 Mich. 173.....	635
— v. White, 194 Mich. 175.....	590
— v. Willett, 105 Mich. 110.....	592
— v. Winney, 196 Mich. 347.....	634
— v. Yund, 163 Mich. 504.....	595
Pere Marquette R. Co. v. Wabash R. Co., 141 Mich. 215....	358
Perkins v. Galloway, 194 Ala. 265.....	583
— v. Perkins, 12 Mich. 456.....	38
— v. Township of Delaware, 113 Mich. 377.....	185
Pershing v. Railway Co., 206 Mich. 304.....	632
Peter v. Railway Co., 121 Mich. 324.....	551
Petley v. Wayne Circuit Judge, 124 Mich. 14.....	269
Phillips v. Benevolent Society, 120 Mich. 142.....	416
Pigeon v. Lane, 80 Conn. 237.....	583
Pioneer Iron Co. v. City of Negaunee, 116 Mich. 430.....	216
Pocs v. Buick Motor Co., 207 Mich. 591.....	645
Pollock v. McCarty, 198 Mich. 66.....	88
— v. Trust Co., 157 U. S. 429, 158 U. S. 601.....	360
Pool v. Township of Montague, 194 Mich. 476.....	187
Porter v. Leache, 56 Mich. 40.....	386
Postal Telegraph-Cable Co. v. Call, 255 Fed. 850.....	408
Price v. Brotherhood of R. R. Trainmen, 116 Minn. 225....	451
Public Schools of Muskegon v. Smith, 173 Mich. 570.....	649
Railroad Co. v. Durant, 95 U. S. 576.....	315
Railway Mail Ass'n v. Harrington, 136 C. C. A. 230.....	678
Rambousek v. Supreme Council, 133 Iowa, 375.....	451
Randall v. Wayne Circuit Judge, 96 Mich. 284.....	72
Rathbone v. Railway, 187 Mich. 586.....	141
Rathman v. Casualty Co., 186 Mich. 115.....	665
Ready v. Kearsley, 14 Mich. 215.....	314
Renackowsky v. Board of Water Com'rs, 122 Mich. 613....	386
Reynolds v. Reynolds, 115 Mich. 378.....	38
Richardson v. Railway Co., 176 Mich. 413.....	132
— v. —, 182 Mich. 206.....	187

	PAGE
Rickabus v. Gott, 51 Mich. 227.....	416
Riley v. Railway, 163 Mich. 327.....	447
Roach v. Kelsey Wheel Co., 200 Mich. 299.....	644
Roberts v. Abstract Co., 63 Iowa, 76.....	231
Robertson v. Corsett, 39 Mich. 777.....	390
Robinson v. Railroad Co., 222 U. S. 506.....	429
Rogers v. Anderson, 40 Mich. 290.....	293
—— v. Davison, 188 Mich. 519.....	400
Roscommon Township v. Midland Supervisors, 49 Mich. 454.....	556
Rosecrants v. Shoemaker, 60 Mich. 4.....	177
Rossello v. Trella, 206 Mich. 20.....	397
Rothschild v. Dickinson, 169 Mich. 200.....	314
Rutherford v. Railroad Co., 254 Fed. 880.....	408
St. Louis Hoop & Stave Co. v. Wayne Circuit Judge, 155 Mich. 311.....	269
Sanborn (G. F.) Co. v. Alston, 153 Mich. 456.....	401
Sanford v. Railway Co., 190 Mich. 390.....	632
Schade v. Gahner, 133 Mo. 252.....	227
Schellenberg v. Lighting Co., 130 Mich. 439.....	391
Schumacher v. Railroad Co., 175 N. Y. Supp. 84.....	408
Schweyer (John) & Co. v. Mellon, 196 Mich. 590.....	397
Scovel v. City of Detroit, 159 Mich. 95.....	192
Scudder v. Anderson, 54 Mich. 122.....	390
Semmons v. Benefit Ass'n, 180 Iowa, 666.....	673
Shank v. Woodworth, 111 Mich. 642.....	386
Shawnee Fire Ins. Co. v. Cosgrove, 86 Kan. 374.....	487
Shoptaugh v. Railroad Co., 147 Mo. App. 17.....	439
Shorts v. City of Seattle, 95 Wash. 531.....	525
Shryock v. City of Zanesville, 92 Ohio St. 375.....	525
Shufelt v. Railroad Co., 96 Mich. 327.....	632
Siegrist v. Arnot, 10 Mo. App. 197.....	583
Silverstone v. Assurance Corp., 187 Mich. 333.....	332
Skinner v. Accident Ass'n, 190 Mich. 353.....	670
—— v. Grace Church, 54 Mich. 543.....	314
Smith v. Insurance Co., 107 Mich. 270.....	657
Sokup v. Davis' Estate, 206 Mich. 144.....	203
Solomon v. Township of Oscoda, 77 Mich. 365.....	217
Speck v. Township of Bruce, 166 Mich. 550.....	187
Spitzley v. Garrison, 201 Mich. 363.....	52
Spray v. Ayotte, 161 Mich. 595.....	466
Spurr v. Travis, 145 Mich. 721.....	381, 476
Squire v. Tellier, 185 Mass. 18.....	381, 476
Stanton v. Insurance Co., 83 Conn. 708.....	666
State v. Railroad Co., 71 Neb. 593.....	439
——, ex rel. Crow, v. City of St. Louis, 169 Mo. 31.....	525
Stebbins v. Township of Keene, 55 Mich. 552.....	93
Stevenson v. Railway Co., 118 Mich. 651.....	187
Stewart v. Harris, 69 Kan. 498.....	33
Stockton v. Williams, Walk. Ch. 120.....	445
Stokely v. Casualty Co., 193 Ala. 90.....	667
Stoll v. Laubengayer, 174 Mich. 701.....	535
Story & Clark Piano Co. v. Hilderink, 189 Mich. 131.....	216
Stroh v. O'Hearn, 176 Mich. 164.....	709

TABLE OF CASES CITED.

xxi

	PAGE
Strong v. Repide, 213 U. S. 419.....	32
Stroud v. Water Co., 56 N. J. Law, 422.....	525
Sunday Lake Iron Co. v. Township of Wakefield, 186 Mich. 631	217
Supreme Council C. K. A. v. Fenwick, 169 Ky. 269.....	451
—— v. Logsdon, 183 Ind. 183.....	453
—— v. Wathen, 179 Ky. 64.....	451
Supreme Lodge O. M. P. v. Meister, 204 Ill. 527.....	451
Suter v. Jordan Marsh Co., 225 Mass. 34.....	354
Svea Assurance Co. v. Packham, 92 Md. 464.....	487
Tabor v. Cook, 15 Mich. 322.....	445
Ten Eyck v. Railroad Co., 74 Mich. 226.....	9
Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426	428
Thatcher v. St. Andrew's Church, 37 Mich. 264.....	89
The Livingstone, 65 C. C. A. 610.....	489
——, 194 U. S. 637.....	490
Thiedemann v. Michigan State Board of Dental Examiners, 204 Mich. 151.....	554
Thomas v. Trust Co., 81 Ohio St. 432.....	227
Toles v. Duplex Power Car Co., 202 Mich. 224.....	17
Town v. Duplex Power Car Co., 172 Mich. 519.....	17
Township of Forest v. American Bonding Co., 180 Mich. 90..	386
Township of Roscommon v. Midland Supervisors, 49 Mich. 454	556
Traverse City v. Railroad Commission, 202 Mich. 575.....	266
Trieber v. Railway Co., 134 App. Div. 661.....	135
Trombly v. Klersy, 139 Mich. 311.....	683
Trudell v. Railway Co., 126 Mich. 73.....	534
Truitt v. City of Battle Creek, 205 Mich. 180.....	619
Tubbs v. Railroad Co., 107 Mich. 108.....	138
Tucker v. Stone, 92 Mich. 298.....	39
Turner v. Ottawa Circuit Judge, 123 Mich. 617.....	269
Union Ice Co. v. Railway Co., 178 Mich. 346.....	488
Vaughn v. State (Ala. App.), 81 South. 417.....	408
Village of Champlain v. McCrea, 165 N. Y. 264.....	525
Vowles v. Young, 13 Ves. 140.....	302
Wagar v. Railroad Co., 79 Mich. 648.....	164
Walker v. Walker, 155 N. Y. 77.....	38
Wall v. Trumbull, 16 Mich. 228.....	218
Walsh v. Goulden, 130 Mich. 531.....	29
—— v. King, 74 Mich. 350.....	217
Ward v. Insurance Co., 85 Neb. 471.....	667
Warner (W. H.) Coal Co. v. Nelson, 204 Mich. 317.....	269
Waters-Pierce Co. v. Deselms, 212 U. S. 159.....	227
Watson v. Watson, 58 Mich. 507.....	674
Webber v. Randall, 89 Mich. 531.....	40
Welsh v. Michigan Maple Co., 161 Mich. 16.....	169
West v. Bechtel, 125 Mich. 144.....	169
—— v. Hudson, 171 Mich. 669.....	598

	PAGE
Western Massachusetts Ins. Co. v. Riker, 10 Mich. 279.....	87
Wheeler v. Bedell, 40 Mich. 693.....	390
White v. Cowing, 205 Mich. 318.....	534
—— v. Insurance Co., 95 Minn. 77.....	666
—— v. Smith, 37 Mich. 291.....	195
Whitworth v. Pelton, 81 Mich. 98.....	386
W. H. Warner Coal Co. v. Nelson, 204 Mich. 317.....	269
Wickes Bros. v. Hill, 115 Mich. 333.....	391
Willis v. Oscar Daniels Co., 200 Mich. 19.....	371
Wilson v. Hugus, 163 Mich. 577.....	374
Woodman v. Auditor General, 52 Mich. 28.....	218
Woods v. Monroe, 17 Mich. 238.....	444
Wormsdorf v. Railway Co., 75 Mich. 472.....	93
Wright v. Beach, 82 Mich. 469.....	598
Zweigardt v. Birdseye, 57 Mo. App. 462.....	227

LAWS CITED AND CONSTRUED.

UNITED STATES CONSTITUTION.

	PAGE
Art. 1, § 8.....	370

UNITED STATES STATUTES.

	PAGE		PAGE
24 U. S. Stat. p. 379.....	427	34 U. S. Stat. p. 584 ..	427, 429
25 U. S. Stat. p. 855.....	427	39 U. S. Stat. p. 645.....	404
28 U. S. Stat. p. 643.....	427	40 U. S. Stat. p. 451 <i>et seq.</i>	405
32 U. S. Stat. p. 847.....	427	— p. 1733	404

CONSTITUTION OF MICHIGAN (1850).

	PAGE		PAGE
Art. 4, § 38.....	263	Art. 15, § 13.....	263

CONSTITUTION OF MICHIGAN.

	PAGE		PAGE
Art. 8, §§ 20, 21, 28.....	257	Art. 8, §§ 20-25, 28.....	264

COMPILED LAWS 1871.

	PAGE
§ 3726	652

COMPILED LAWS 1897.

	PAGE
§§ 9970, 9971.....	556

HOWELL'S STATUTES (2D ED.).

	PAGE
Chap. 28, § 1815.....	368

COMPILED LAWS 1915.

	PAGE		PAGE
§§ 329	315	§§ 5712	649
552	682	5760	651
3304 <i>et seq.</i>	256	5998	278
3307.....	258, 518	6346-6348	379, 475
4043	368	6349 <i>et seq.</i>	397
4130	400	6750, 6752.....	553
4138 <i>et seq.</i>	401	7050	175
4586	181	7051	176
4825	585	9481	86
5423	347	11408	38
5437	644	11565 <i>et seq.</i>	314

(xxiii)

COMPILED LAWS 1915—Continued.

	PAGE		PAGE
§§ 11751	313	§§ 13440	556
11832 <i>et seq.</i>	162	13685	601
11876	168	13688, subd. 5	467
11981	690	13691	466
12302	443	13753	447
12309	72	13754	38, 681
12335	293	13763	73
12362	489	14145 <i>et seq.</i>	202
12407	271	14152	203
12456	385	14156	203
12478	410	14237	42
12486-12488	204	14402, 14403, 14406, 14408	242
12554	94	14565	595, 637
12580	268	14568	321, 551
12625	560	14568 <i>et seq.</i>	86, 559
13243	56	14577	333
13252	241, 243	15505	588
13253	243		

SESSION LAWS.

	PAGE		PAGE
1840, Act 76, p. 127	443	1912, Act 10, pt. 2, § 7...	644
1849, Act 223	512	1913, Act 53	651
1871, Act 368, § 1	647	— Act 100	162
— — § 5	648	— Act 146	651
1879, Act 374, § 16	198	— Act 183	553
1881, Act 17	365, 368	1915, Act 89	595, 637
— Act 164, chap. 2, § 17 ..	651	— Act 217	86, 559
— — chap. 6, § 1	650	— — § 1	551, 561
— — chap. 13, § 10	651	— Act 314, chap. 12, § 11	489
1889, Act 404 (Local)	512	— — chap. 14, § 4	385
1893, Act 206, § 131	400	— — chap 36, § 4	556
1897, Act 229	401	— — chap. 65, § 1	202
1905, Acts 455, 492	513	1917, Act 243	243
1907, Act 101	397	— — § 25	224
— Act 338, §§ 3, 5	553	— Act 256	86
— Act 340	682	— Act 338, § 38	237
1909, Act 279	256		
1912, Act 10 (Extra Ses- sion)	69		

CIRCUIT COURT RULES.

	PAGE		PAGE
No. 23, § 2	409	No. 45	364
No. 25	53	— § 4	374
No. 32, § 4	269		

IN MEMORIAM.

RUSSELL C. OSTRANDER.

Upon the convening of court for the January term, 1920, on Tuesday, January 6th, HARRIS E. THOMAS, of Lansing, presented the following resolution, prepared by a committee of the Ingham County Bar Association, and moved the court to place it on the records of the court.

May it Please the Court:

For the third time in four years we have been called upon to mourn the death of one of the Justices of our Supreme Court. In each case the summons has come without warning and has shocked this community by its suddenness. In the midst of their usefulness, and while they were still at work, the summons came and they passed on to the "pale realms of shade."

On the evening of September 11, 1919, Justice OSTRANDER retired as usual. About midnight his heart ceased to perform its function and his life's journey was ended. He left surviving a widow and four children, three daughters and a son, all grown to maturity. He was twice married, first to Dora Porter, daughter of Major Frank Porter of the Twentieth Michigan Infantry. She was the mother of his children. She died in 1888, and in 1892 he was married to Lou S. Davis.

RUSSELL COWLES OSTRANDER was born at Ypsilanti, Michigan, September 1, 1851. His father, Simon Ostrander, was by trade a wagon and carriage maker, in the days when they were built of good timber by

skilled hands. In 1858, he moved with his family from Ypsilanti to Lansing, where, in company with P. G. Sprang, he conducted a thriving business for many years. His son Russell first attended school at Lansing in 1858 at the old Townsend street school, later at North Lansing, and when the high school was established took the high school course, and graduated therefrom at about the age of sixteen. In 1868, he taught school in Woodhull township, Shiawassee county. It was in these primary schools that the foundation was laid for the liberal education which in his case was largely self-acquired. When barely more than a boy, he left school and went to work in a general store of Robson Bros. at Lansing, and was there employed for several years. Later, he went to Jackson and was engaged in the same kind of work. While so employed, he began the study of law by reading Blackstone's Commentaries. In 1873 he became a student in the law office of Albert E. Cowles, and remained there until in the fall of 1874 he entered the law department of Michigan university. He graduated in June, 1876, and was admitted to the bar by the Supreme Court. At the fall election of the same year he was elected circuit court commissioner and re-elected in 1878. During the years 1879 and 1880 he was employed by the prosecuting attorney as his assistant, and was himself elected to that office in 1880, and served one term. In 1882, the firm of Cahill & Ostrander was formed, and continued until 1898. In 1885, he was the republican candidate for circuit judge of the fourth judicial circuit, then composed of Jackson and Ingham counties, but was defeated by Erastus Peck, the democratic candidate. In 1895 and 1896, he served by appointment as city attorney of Lansing. Justice OSTRANDER was always interested in politics, not only in theory but in practice. He was a republican of the strictest sort, but never, ex-

cept on one occasion, could he be persuaded to run for any office outside of his profession. In 1896 and 1897, he was elected and served as mayor of Lansing.

He served as a member of the State board of law examiners from 1895 to 1904. He was president of the Michigan State Bar Association in 1903 and 1904.

Justice OSTRANDER was first elected to the office of Justice of the Supreme Court on November 8, 1904, for the term of seven years. He assumed his duties on January 1, 1905. He was re-elected April 4, 1911, for the term of eight years. His second term of office commenced January 1, 1912. On April 7, 1919, he was again elected for the term of eight years. Had he lived, he would have commenced his third term as Justice of the Supreme Court on January 1, 1920.

Justice OSTRANDER was Chief Justice of the Court during the years 1911 and 1918.

The first case in which he wrote the opinion of the court was *Cadillac State Bank v. Wexford Circuit Judge*, 139 Mich. 126, a mandamus case. This opinion was filed February 27, 1905. Since that time the Michigan Reports are replete with evidence of his splendid work upon the bench. No single opinion in any case can be said to crown his efforts, but possibly the most important case in which he delivered the court's opinion, from the standpoint, not only of dollars and cents, but likewise because of the principles of corporation law involved, was that of *Dodge v. Ford Motor Co.*, 204 Mich. 459. His reasoning in that case is clear, cogent and convincing. In fact, Justice OSTRANDER was a man whose power of analysis was seldom excelled. He was endowed with a remarkably clear thinking mind, and was able to reduce his thoughts to paper with a simple and elegant diction that was both entertaining and persuasive. His fourteen and one-half years' labor in the Supreme Court fairly reflect his great worth as a man and a jurist.

The bar of Ingham county, and more particularly of the city of Lansing, where Justice OSTRANDER spent his entire professional life of more than forty years, has more than the common sorrow and regret for his untimely death. The State at large mourns the loss of one of its great citizens and valued public servants, but we, while sharing in this common loss, mourn him as a beloved friend and brother, whose vacant place in our counsels cannot be filled. The citizens of Lansing, among whom he lived as a boy and man for more than half a century, not only honored him with their confidence but felt for him sincere affection, and we believe their hearts are with us on this occasion though they be absent in the body.

EDWARD CAHILL,
CHAS. W. NICHOLS,
CHARLES F. HAMMOND,
CHAS. H. HAYDEN,
WALTER S. FOSTER,
Committee.

The Honorable WILLIAM L. CARPENTER, of Detroit, spoke as follows:

May it Please the Court:

RUSSELL C. OSTRANDER was admirably fitted to be a Justice of this court. He had extraordinary natural abilities, abundant legal learning, a judicial temperament, a judicial presence, a judicial demeanor, a just sense of the importance of this court, a proper conception of his judicial duties and a fixed determination to discharge those duties in accordance with that conception.

He first undertook to acquire a correct understanding of the case he was called upon to decide. Speaking generally, he succeeded in this undertaking. His opinions show that rarely indeed did he have any material misconception of the case. He acquired this

generally correct conception, not by intuition but by conscious endeavor—chiefly by due attention to the briefs and arguments of counsel.

His attitude during argument was admirable and deserves the highest commendation. He was an attentive listener and his attractive, expressive face faithfully portrayed that attentiveness. This greatly encouraged counsel, resulting in better and fairer arguments, to the advantage of the court and to the cause of justice. After thus acquiring a knowledge of the case, he exerted himself to have it decided in accordance with his conception of the law applicable thereto. In determining this applicable law, Justice OSTRANDER had a just regard—and I think no more than a just regard—for precedent. If the decisive question in the case had been determined by a long series of uniform decisions of this court, or if the decision turned upon a rule of practice, he was strongly inclined to follow precedent, unmoved by the argument that it would result in injustice in the particular case under consideration. In other cases, that is, in cases where the decision could be predicated on the general principles of the common law or by the application of those principles in the construction of statutory or constitutional provisions, he paid little heed to precedents. Here he exhibited wisdom, independence, originality and courage in selecting that common law principle which led to a just decision of controversies like that under consideration.

Justice OSTRANDER, like every other Justice of an appellate court, will be judged by the character of his written opinions. So judged, he is certain to occupy a high place. For he was a brilliant and graceful writer and his thoughts were grammatically and elegantly expressed. He did not use extravagant or intemperate language either in stating facts or the applicable law. His opinions were appropriate to the

case and read as if they were written by a judge compelled to make a fair decision, and not by a partisan employed to advance an argument.

High as will Justice OSTRANDER rank, if judged by his written opinions, he deserves to be placed even in a higher rank. For as he himself said in his excellent tribute to the memory of Justice HOOKER, the "consideration" of his opinions "will not disclose the most considerable, and, in my opinion, the most valuable service which he rendered to the court, the bar and the people. * * * He concerned himself about all of the opinions of the court delivered in causes in the decisions of which he took part. * * * In this manner he impressed himself upon and into the work of the court and in this way his judgment is reflected in the judgments of the court." These were appropriate words to characterize the work of Justice HOOKER—they are appropriate words to characterize the work of Justice OSTRANDER.

The law expounded by the courts, as well as the law enacted by the legislature, is slowly but constantly changing and if we have faith in righteousness—and no wise person can lack that faith—we must believe that it is growing nearer perfection. During the nearly fifteen years that Justice OSTRANDER was a member of this court the law of Michigan so grew. It so grew perceptibly and no single influence contributed more to that growth than that exerted by him in the manner I have indicated.

MR. ALVA M. CUMMINS, of Lansing, spoke as follows:

May it Please the Court:

Owing to the enforced absence of Judge CAHILL, who was to have spoken from the intimacy of his knowledge of the life, character and attainments of his long-time business associate and friend, I have been asked to say a few words on this occasion.

I do this hesitatingly, for I feel that at such a time one's utterances should be the result of careful thought and should be free from the impulses of the moment.

I have known Justice OSTRANDER for considerably more than a quarter of a century. At the beginning of our acquaintance he stood high in his profession and the esteem in which he was held by his associates, by his clients and by the public in general was an increasing one throughout all the years of his practice at the bar and of his service upon this bench.

I was early impressed with the fact that RUSSELL C. OSTRANDER practiced law on a high plane and his influence upon the professional life of his associates was both far reaching and elevating.

To illustrate the mental attitude of this man toward the problems of his profession, I will speak of an incident of which I knew in his practice. A client of his and a man of prominence in the State, laid before him a proposed line of business conduct with the query as to whether it would, if carried out, amount to a violation of any criminal law of the State. Mr. OSTRANDER did not hesitate. His answer was direct and pointed. He said in substance:

"If a man had actually done what you propose to do, I might, to save him from the danger of imprisonment, investigate the question you propound, but I decline to inquire in advance or to advise as to its criminality. It is indefensible from the standpoint of business morals and decency, and if you do it, you do it at your peril so far as I am concerned."

Another incident well illustrates the type of man he was. An important matter came into his hands which it was necessary, owing to the financial situation of his client, should be handled on a contingent fee. A long drawn out and hard fought legal battle seemed inevitable and no provision was made in the contract for a lessened fee in case such a contest did not take place. But none was necessary with RUSSELL

C. OSTRANDER. The case was settled without a trial on a very favorable basis which would, had he stood on the letter of his contract, have entitled him to a large fee. His client expected nothing else than the payment of the full stipulated amount. But Mr. OSTRANDER, to the surprise of his client, handed her a check for the amount received in the settlement, less only a very minor fraction of the sum agreed upon.

Justice OSTRANDER possessed the type of mind which could never be hurried to its conclusions. He did not jump hastily to a conclusion and then devote his talents to the search for reasons and authorities to sustain it. His convictions followed legal research and analysis. They did not run in advance of them.

He lived his life well as man and lawyer and judge, and his State is the better for his life and services. May his influence long continue and his example be not soon forgotten.

Justice BROOKE spoke as follows:

Justice OSTRANDER was a member of this court for fifteen years, having served since January, 1905. His period of service was comparatively short, yet long enough for him to have left a distinct impress upon the jurisprudence of the State. His unusual natural abilities had been disciplined and matured by an active and dignified practice and when he left the bar he was admirably equipped for the discharge of the duties of the bench. His quickness of apprehension enabled him to readily grasp the essentials of a case and the weight and bearing of an argument. He was patient and thorough in investigation. Widely familiar with the learning of the law, he was no mere book lawyer. The law to him was no collection of *sacro-sanct formulæ* whose exact and meticulous observance was the sum and limit of judicial duty, but a living organism, elastic, vigorous and infinitely adapted to

the needs and changes of a progressive society. He knew the history of our law and the enormous difficulty with which its principles have been developed and established. He realized the futility of theoretical determinations of right and justice and the infinite perils of disturbing rules tested and approved by long experience, the need of maintaining the uniformity of decisions and the continuity of development.

This made him diligent to compare not only his own opinions but those of his associates with the former decisions of the court. The press of business makes inadvertent departure from precedent easy. Such departure he was sedulous to avoid and he did more to prevent errors of this nature than any other judge of his time, except, possibly, the late Justice HOOKER. The labor involved in the task thus voluntarily assumed was great but its results are only apparent to his associates and they alone can truly estimate their value.

He was conservative in the sense that any vigorous and instructed mind capable of looking into the future and properly estimating the past necessarily will be.

The great structure of the law has been slowly and painfully developed through many centuries in the countless vicissitudes of political and social growth. It has been tried and tempered in the heats of a thousand conflicts between the actual and the ideal, the never-ending struggle between the selfish interests of individual and of class that are coeval with civilization itself and the aspirations toward a larger and higher life which make progress possible. No institution so developed can be ideal, but it expresses and answers the enduring needs and conceptions of the society out of whose demands it grows, as no ideal system could. As those needs and conceptions change, the law changes. The process has been, and for safe

and healthful development it must necessarily be, slow and in accordance with the spirit and genius of the great social organization of which the law itself is but a part. With these truths Justice OSTRANDER was profoundly impressed. Accordingly, he had small regard for the nebulous visions and crude experiments of those who, ignorant of the past, have no clear discernment of the causes of present ills or of proper remedies for future palliation of those ills.

His conception of judicial duty and of legal progress was founded in the spirit of the oath he had taken to support the Constitution and the laws. He believed that by the wise administration and conservation of the law, our great and priceless heritage from the past, unimpaired by rash and ignorant innovations, could be maintained and the safety, happiness and true progress of the State secured. To that administration his life was dedicated and to that high conception of judicial duty he was always faithful.

Chief Justice MOORE spoke as follows:

I can add but little to the appreciative utterances so fittingly spoken by those who have preceded me.

My acquaintance with RUSSELL C. OSTRANDER began nearly thirty years ago when we were passengers in an old-fashioned stage going from the railroad into Bad Axe where I was to hold court for Circuit Judge Watson Beach, who for some reason did not want to hear an important case. There was a downpour of rain. The country was new and flat, and the horses traveled through water above their fetlocks a good share of the way. Mr. OSTRANDER had just finished Mr. Bellamy's popular book entitled "Looking Backward" and told us in a most charming way about the plans unfolded in the book to secure more of the comforts of life for the average man and his family, indicating his strong feeling for the welfare of his fel-

lows, a characteristic which followed him until death.

There were several solicitors employed in the case which I was to hear, and Mr. OSTRANDER was one of them. His conduct of the case demonstrated that he was possessed of great legal learning. The respect for his legal ability then begun, continually grew until the last. Since I have been a member of this court I have been associated with a number of men who performed their work well, and then fearlessly passed into the future life. Justices LONG, HOOKER, BLAIR, MCALVAY, PERSON, and OSTRANDER, who have gone hence, were all worthy men.

Justice OSTRANDER was the associate of four of these men. His work co-ordinated well with theirs. He had their confidence and respect and was worthy of it.

A little more than eight years ago a service was held in this room in memory of the late Justice HOOKER. Justice OSTRANDER was Chief Justice. I quote from some of the things he then said:

"He possessed the power of close analysis, mental stores well assorted and available, and the genius of common sense. He had formed no habits which interfered with the fullest exercise of his intellectual faculties, and had no interests which might affect his honest judgment. He surveyed life and men, and the actions of men, with level eyes, without passion, and, as nearly as any of us can do so, without prejudice. He was charitable towards human frailties, and had the saving grace of humor. Add to these qualities honest purpose, a high sense of the importance of the work of the court, instinctive rectitude, and great capacity for work, and you have, somewhat broadly pictured, the apparent characteristics of the man. * * *

"But he was by nature helpful. He was unselfish of his time and knowledge in aid of his colleagues. He gave cheerfully, bountifully, helpfully. He concerned himself about all of the opinions of the court delivered in causes in the decision of which he took part, not in the framing, but in the matter of them. The members of the court came to rely with increasing

confidence upon his painstaking examination of cases, reviewed with care conclusions opposed to his, and advanced with greater confidence reasoning of which he approved. In this manner he impressed himself upon and into the work of the court, and in this way his judgment is reflected in the judgments of the court. It is due to his reputation and his memory that so much should be said."

With what aptitude do these words describe some of the characteristics of Justice OSTRANDER.

Death is as inevitable as birth, and if we understood we would regard it as just as desirable. I have no doubt Justice OSTRANDER, for the last year or two of his life, believed the summons might come at any time, but he went on with his work unafraid.

The memorials which have been presented and the words of appreciation which have been spoken will be made records of the court, and will be published in the Reports, and in token of respect the court will take a recess until 1:30 p. m.

SUPREME COURT RULE NO. 61.

When an appeal shall be taken to the Supreme Court by any one of the parties from any decree or final order of a circuit court, in chancery, pursuant to the provisions of section 13753, of the Compiled Laws of 1915, and the rules of this court applicable thereto, any of the other parties to such suit or proceeding may within twenty days after receiving the notice of appeal therein provided for, perfect an appeal on his own behalf by complying with the provisions of such statute and rules.

This rule shall take immediate effect.

Adopted February 27, 1920.

OCTOBER TERM, 1919.*

GARBER v. TOWN.

1. CORPORATIONS—OFFICERS—DUTIES—SALE OF ASSETS—FIDUCIARY RELATIONS—TRUSTS—ACCOUNTING.

Where the president of a corporation acted as its salesman in the sale of its assets to another corporation and received, in addition to the purchase price which the stockholders agreed to accept, \$75,000 in stock of the purchasing corporation, it being understood between himself and the purchaser that he was to keep \$50,000 and turn \$25,000 over to another who assisted in putting the deal through, equity will require that he account to the other stockholders for their proportionate share of the additional stock so received by him; it being apparent that it was in reality part of the purchase price.

2. SAME.

Although said president did not personally benefit by the \$25,000 so turned over to another, he had no right to make any such arrangement, and, the stock having passed through his hands, he will be required to account for the same. MOORE, J., dissenting.

3. SAME—TRANSACTIONS BETWEEN OFFICER AND DIRECTORS—SALE BY PRESIDENT TO CORPORATION.

Where the president of a corporation made an arrangement with his board of directors to sell to the corporation the premises occupied by it, taking in payment its stock worth \$30,000, although a few months before he had offered to sell for \$15,000, they will be required to account for the difference in value, in a suit in behalf of the stockholders; transactions between an officer of a corporation and his board of directors being subject to careful scrutiny, and, to be sustained, must have been made in the interest of the corporation.

4. SAME—PURCHASE OF STOCK—ACCOUNTING.

The president of a corporation will be required to account to the stockholders for the extra value of shares of its stock issued to him and charged to his account at par, where they were at the time worth double the par value.

*Continued from Vol. 207.

Appeal from Eaton; Webster (Clyde I.), J., presiding. Submitted October 31, 1919. (Docket No. 106.) Decided December 22, 1919. Rehearing denied April 10, 1920.

Bill by Rolandus A. Garber and others against Frank P. Town and others for an accounting. From a decree for plaintiffs, defendants appeal. Modified, and affirmed.

Elmer N. Peters, Frank A. Dean and Claude J. Marshall, for plaintiffs.

William W. Potter, R. L. Sowers and Burritt Hamilton, for defendants.

BIRD, C. J. This litigation grows out of the sale of the assets of the Duplex Power Car Company, of Charlotte, to the Duplex Truck Company, of Lansing, in November, 1916. A reference to the cases of *Hill v. Town*, 172 Mich. 508 (42 L. R. A. [N. S.] 799); *Town v. Duplex Power Car Co.*, 172 Mich. 519; *Toles v. Duplex Power Car Co.*, 202 Mich. 224, and *Bollstrom v. Duplex Power Car Co.*, *post*, 15, will be found helpful in the consideration of this opinion.

On October 30, 1916, the following agreement, referred to as Exhibit A, was entered into between the defendant Town, who was at that time president of the car company, and certain residents of Lansing, referred to as the Lansing syndicate:

"This agreement, made this 30th day of October, 1916, between Frank P. Town of Charlotte, party of the first part, and Harry H. Lee, G. W. Hewitt, Harry P. Harper, Elgin Mifflin, W. H. Porter, E. S. Porter, J. Edward Roe, James H. Robinson and H. E. Bradner, all of Lansing, Michigan, parties of the second part, witnesseth as follows:

"Whereas, the parties of the second part propose and intend to organize a corporation for the manufacture and sale of motor power trucks, and it is their purpose and desire when said company is organized to purchase all the property, franchises, rights, privi-

leges, assets and good will of the Duplex Power Car Company of Charlotte, Michigan, and all its patents or rights in patents by license or otherwise, and

"Whereas, the party of the first part is now a large stockholder and general manager of said Duplex Power Car Company, therefore it is mutually agreed as follows:

"1. The corporation to be hereafter organized by second parties as aforesaid will accept a transfer of all the property, rights and assets as above mentioned of the Duplex Power Car Company, and will pay therefor to said Duplex Power Car Company or its stockholders when a good and lawful transfer of said property, rights and assets aforesaid have been made to said new corporation, two shares of stock in said new organization for every one share of stock now outstanding in the said Duplex Power Car Company not exceeding 15,500 shares of the par value of \$155,000 in the latter company, or cash equivalent to double the par value of said Duplex Power Car Company stock, at the option of said company or its stockholders. Said new corporation will assume and pay all the debts and obligations of whatever nature of said Duplex Power Car Company.

"It is agreed that this agreement shall not be binding upon any of the parties hereto until all of the parties named herein have signed the same."

In order to carry out the provisions of Exhibit A, Mr. Town caused a special meeting of the stockholders of the company to be held on November 30, 1916, at which more than three-fourths of the capital stock of the corporation was represented. The Lansing syndicate had at that time been organized into the Duplex Truck Company. At this meeting, a resolution was unanimously adopted authorizing the sale of all the property and assets of the car company to the truck company for \$310,000; the purchaser to assume and pay all the outstanding indebtedness of the car company as per a schedule of same theretofore agreed on. On such sale the stockholders of the car company were to receive double the par value of their stock in cash or two shares in the truck company for each one of

the car company transferred by them. The contract was afterwards fully performed by conveyance and transfers of the stock by the officers of the car company and the payment of cash and the issuance of shares of stock by the truck company. At the same time that Exhibit A was executed, a further agreement in writing was entered into between Town and the Lansing syndicate, which reads as follows:

"This agreement, made this 30th day of October, 1916, between Frank P. Town, of Charlotte, Michigan, party of the first part, and Harry M. Lee, G. W. Hewitt, Harry F. Harper, Elgin Mifflin, W. H. Porter, E. S. Porter, J. Edward Roe, James H. Robinson and H. E. Bradner, all of Lansing, Michigan, parties of the second part, witnesseth as follows:

"Whereas, the parties of the second part purpose and intend to organize a corporation for the manufacture and sale of motor power trucks, and it is their purpose and desire when said company is organized, to purchase all the property, franchises, rights, privileges, assets and good will of the Duplex Power Car Company of Charlotte, Michigan, and all its patents or rights in patents by license or otherwise, and

"Whereas, the party of the first part agrees to acquire possession and control of not less than three-fourths of the outstanding stock of the said Duplex Power Car Company, and that when he so acquires the same, he shall deposit the same with some bank in Charlotte agreeable to second parties with proxies if so desired.

"First party also agrees that when he acquires such stock he shall use the same and its voting power either personally or by proper proxies to cause and procure a sale and transfer of all the property, franchises, patents, rights in patents as aforesaid, business, good will, rights and privileges of the said Duplex Power Car Company to a corporation to be hereafter organized by the parties of the second part. Said new organization to assume and pay all the debts and obligations of whatever nature of said Duplex Power Car Company.

"It is agreed by second parties that in consideration and on condition that the said Town shall acquire said stock of said company as aforesaid, and shall use

or cause to be used to procure or secure the sale and transfer of all of the property, rights and assets of the said Duplex Power Car Company as aforesaid to said corporation to be hereafter organized by second parties, the said second parties will pay to the said first party at the option of said first party \$75,000 in cash or an equal amount of the par value of the stock of said new corporation to be organized by second parties. Said money to be paid or said stock delivered within ten days after said new corporation is organized and said transfer made to it by said Duplex Power Car Company.

"It is agreed that this agreement shall not be binding upon any of the parties hereto until all of the parties named herein have signed the same."

On the same day, Mr. Town signed a writing, reading as follows:

"October 30th, 1916. On fulfillment of the conditions of a certain agreement entered into this day between me and Harry M. Lee, G. W. Hewitt, Harry F. Harper, Elgin Mifflin, W. H. Porter, J. Edward Roe, James H. Robinson and H. E. Bradner, of Lansing, Michigan, I hereby agree to deliver to James H. Robinson, of Lansing, Michigan, \$25,000 worth of par value of the stock of the new company, which is to be organized, to take over the assets and business of the Duplex Power Car Company of Charlotte, Michigan."

Town received the \$75,000 in cash and stock from the truck company and assigned \$25,000 worth of the stock to Robinson pursuant to this writing. The claims of the parties relative to Robinson's connection with the matter will be hereafter stated.

It is admitted by Mr. Town that up to the time of the completion of the sale to the truck company none of the directors or stockholders of the car company had any knowledge of the existence of Exhibit B. On afterwards learning of same, the plaintiffs filed this bill of complaint, on behalf of themselves and all the other stockholders of the car company, praying, among other things, that the sum of \$75,000 so received by Town be decreed to be the property of the car com-

pany and that it be distributed among the stockholders according to their respective shares at the time of such sale. We will dispose of this claim before taking up the other questions presented. The trial judge deducted the value of the stock assigned to Robinson, and granted the relief prayed for as to the balance of \$50,000.

It is the claim of Town that the agreement under which he received the \$75,000 in money or stock had nothing whatever to do with the sale of the property of the car company to the Lansing syndicate. The negotiations by which the deal was brought about were conducted between Town and Louis Rowley, of Lansing. It is Town's claim that the agreement (Exhibit B) does not fairly state the consideration for which it was executed. He testified:

"At the time of these negotiations with Mr. Rowley up to the time this contract was made, not a word, not an intimation of any kind, was made about compensation to me. That question did not enter into the price which I put upon the plant in any way; the negotiations would have gone through just the same whether there had been one dollar paid outside or not; it had nothing to do with it. After that deal had been all completed Mr. Rowley said: 'I have a friend who is interested in this deal; he is the man who first interested the Detroit parties to come up here, but he is not interested in this; that is, he has not been identified, and I feel as this deal has grown out of that, that he is entitled to a little commission,' and I said at once, 'Mr. Rowley, if there is any commission paid any one out of this business you will have to get it from the other end, for I wouldn't take one dollar from the stockholders to pay anybody a commission.' 'Well,' he says, 'Mr. Lee and I have talked this matter over and I can make arrangements so that it will come out of the other end,' and I says, 'Very well, that is none of my affairs; this is the deal and it is made in good faith with the stockholders and it will have to be made. I won't have anything to do with anything further.' 'Now,' he says, 'you know these people are inexperienced in the manufacturing line; I will tell you what we propose to do. These men have simply

been—Mr. Lee was a sales agent in the Reo and Mr. Hewitt was an auditor and bookkeeper, and they knew nothing about manufacturing trucks. It is going to be absolutely necessary for you to remain with the new company for a while.' I said, 'Mr. Rowley, you know my condition at that time; I need a rest and I was going away.' 'Well,' he said, 'we must have your services. We are going to be liberal with you. Mr. Lee said we should be liberal with you, and,' he said, 'we are going for your services—you know there are suits to be taken care of and no one can take care of them as well as you, and to initiate these men into a new business—we are going to give you \$50,000 for your services, and I want you to put this \$25,000 for Mr. Robinson in with it and call it \$75,000.' So it was left that way. I suppose that was a verbal understanding and they could give me what they had a mind to if they wanted my services, but on the 30th they brought what is termed a private contract. That is the contract that has been introduced in relation to the \$75,000."

As to this matter Mr. Rowley testified:

"I called his attention to the fact that I wanted to have Mr. Robinson taken care of. I said I was getting my commission from the Lansing end of it, but I thought that Mr. Robinson, who had first called my attention to it and had participated in the Detroit negotiations, should be taken care of. I asked him to do it; he said, 'How will I do it?' 'We will have to add that.' I thought I saw some complications in the way and so I said, 'No, we will arrange that differently.' At this time I also said to him—and this was the first time that matter had ever been broached—that 'In view of what you have done for the Duplex Company' (he told me about the trials and struggles he had had in keeping the thing from going down, and in perfecting the truck and getting it in shape where he could do anything with it, at one time having put over \$80,000 of his own money into it) 'I think as a simple matter of justice you ought to have something extra out of this. I think I can arrange that. I think the people over there more thoroughly appreciate the possibilities of this business than anybody else you can possibly deal with, and I think under the circumstances I can put that up to them so

that they will recognize the value of your services here and what you have done and can do for the new company, and we can make that sort of an arrangement and at the same time I can take care of Mr. Robinson in the same way.'"

Rowley further testified that he afterwards took the matter up with the Lansing people and they agreed to it and Exhibit B was prepared and executed the same day as Exhibit A.

Mr. Lee and Mr. Hewitt, two of the Lansing parties, who afterwards became president and secretary and treasurer of the truck company, both testified that Exhibits A and B were executed at the same time and were a part of the transaction which culminated in the purchase of the property. Mr. Lee further said that in order to put the deal across they had to include the \$75,000 paid Mr. Town.

Under the facts as stated, we feel constrained to hold that the defendant Town must account to the other stockholders for their proportionate share of this \$75,000. While he assumed to make the deal as an individual, he was at that time the president of the corporation and was dealing with corporate property. He occupied a fiduciary relation to the corporation and cannot be permitted to personally profit in any transaction in which its rights or interests were involved. It is apparent that the \$75,000 received by him was a part of the purchase price which the truck company paid for this property. The claim that it was to include services to be thereafter rendered by him for the truck company cannot, in our opinion, be sustained. While it may be said to be somewhat supported by the testimony of Mr. Rowley, it is significant that neither Mr. Lee nor Mr. Hewitt was asked concerning it. This money was a part of the consideration paid by the truck company for the assets of the car company and as such it belonged to and became the property of the car company when paid to Mr. Town. The relationship of its officers, and the

duties they owe to the corporation, is well expressed in *Ten Eyck v. Railroad Co.*, 74 Mich. 226 (16 Am. St. Rep. 633, 3 L. R. A. 378) :

"The entire management of corporate affairs is committed to their charge, upon the trust and confidence that they shall be cared for and managed within the limits of the powers conferred by law upon the corporation, and for the common benefit of the stockholders. They are required to act in the utmost good faith, and in accepting the office they impliedly undertake to give to the enterprise the benefit of their best care and judgment, and exercise the powers conferred solely in the interest of the corporation."

Town assumed to act as a salesman for the corporation in disposing of its assets to the truck company. While acting as such, he cannot secure to himself advantages not common to all the stockholders. In his dealings with the assets of the corporation, while acting as its president, equity will require him to account for all that he receives for the common benefit of all. It was his duty to make the most advantageous bargain possible. While that which he secured to them under Exhibit A may have been entirely satisfactory and considered a good bargain, yet if the rule of fiduciary responsibility were not strictly applied, even in such cases, the temptation for personal gain would in many cases undoubtedly lead to the sacrifice of the interests of the stockholders in order to secure a greater personal profit to the officer. He must not be permitted to assume a relation which will make his interest antagonistic to that of the other stockholders. By his acts in this transaction he received moneys paid on the purchase of the car company's property as a personal profit to himself. These he must be held to have received as a trustee for the other stockholders and be liable to account to them for it. See 10 Cyc. p. 791, paragraphs 8 and 9, and cases cited; 2 Thompson on Corporations, § 1215 *et seq.*

The trial judge determined that "it would not be equitable or just to compel Mr. Town to turn over

something that he did not receive," and determined not to hold him chargeable with the \$25,000 worth of stock he had turned over to Robinson. On first impression, this might seem but fair and just. We must, however, not overlook the principle involved. Town did receive this \$25,000 in stock of the truck company as a part of the \$75,000 paid under the contract, Exhibit B. As before stated, it was a part of the consideration paid by the truck company on its purchase of the assets of the car company. The stockholders of the car company were entitled to have the entire consideration paid for their property pass to them. This \$25,000 came into Town's hands while president of the company and as a part of such consideration. He had no right to make any arrangement or give any promise to pay any part of it to any person which would prevent its distribution in the usual way among his stockholders. If Robinson had performed services for the car company for which he was entitled to compensation, his claim therefor should have been presented to the board of directors and passed on in the usual way. If the services he rendered were in assisting Rowley to put through the deal for the Lansing syndicate, his claim should have been presented to them. There was clearly a misappropriation of this stock by Mr. Town and he must account to the stockholders for it.

For several years after the car company began its manufacturing business, the premises occupied by it were rented from two banks in Charlotte, each of which owned an undivided one-half interest therein. On November 11, 1911, the defendant Town purchased the interest of the Eaton County Savings Bank for \$2,500, and on May 1, 1915, that of the First National Bank for \$3,000. Some improvements had been made before this last purchase, and some were made by him thereafter. The car company paid \$100 per month rental for the premises for several years. It is the claim of the defendant Town that in the spring of 1916 he called the attention of the board of directors

to the fact that the credit of the corporation was much impaired and that it would be improved should it own the premises which it was then occupying. He testified:

"Finally, the 2d of August, 1916, I suggested to them that they ought to acquire it in some form; that we didn't have the money, but if they would pay a portion in cash I would carry the balance in stock; but we didn't have the money to spare, at that time as I stated to them, but there had to be something done to get it in the name of the company so as to give us a commercial standing, and we were buying then in large quantities and we needed the credit, and they suggested to me if I would take it in stock they would purchase the factory, and I stated to them I thought I ought to have a portion of it in cash, and they proposed they take an option for three months, and during that meeting and conversation they stated to me that if I decided to take stock at any time I might consider it a sale, and if not, they would let it run until 90 days and then they would see what could be developed in paying a portion of it in cash. All the directors were present at that time. * * * At the meeting before the annual meeting, which was the 6th of August, or the 5th of August, I decided inasmuch as it was absolutely necessary to have the company have the credit that I would take the stock of the company for the factory * * * and at the annual meeting on the 6th of August—I guess it occurred on the 5th that year—the 6th fell due on Sunday I think—I made a report to the stockholders and it was talked over and they thought it was a grand good thing."

He further testified that the stockholders expressed themselves as well satisfied with his proposal. The proceedings of this meeting are not inserted in the record, so we assume it contains no reference to the matter. In the minutes of the directors' meeting held on August 2, 1916, three days earlier, we find the following:

"Moved by Mr. Brown and seconded by Mr. White, that the Duplex Power Car Company secure an option

on factory and grounds and machinery belonging to factory now occupied by said Duplex Power Car Company for the term of three months at the price of \$15,000.00."

While both Town and Secretary Murray testified that the question of Town's accepting stock for the real estate was discussed at meetings of the board and that he finally agreed to do so, the record is silent as to any such action until a meeting held on November 1, 1916. The minutes of that meeting read:

"Moved by Mr. Brown and supported by Mr. White, that the Duplex Power Car Company purchase the entire plant now occupied by said company, as per option given said company August 2d, 1916. Price to be fifteen thousand (\$15,000) dollars, to be paid for in stock of said company at par value."

It is elementary that any agreement made between Town and the board of directors relative to the real estate which rested in parol had no binding force or effect, and yet the property which but a few months before he had offered to convey for \$15,000 was now purchased by them from him by authorizing a payment in stock then known to be worth \$30,000.

The authorities before cited sustain the rule that all dealings between an officer of a corporation and his board of directors must be scrutinized carefully and to bind the stockholders must bear evidence of having been in the interests of the corporation. By this transaction, all of the stockholders lost their proportionate share of the \$15,000 which Town received by reason of the stock being then of double par value. This action of the board cannot be sustained as a fair exercise of its powers. We are constrained to hold that not only the defendant Town, but the other defendants, who were then directors and present at the meeting held on November 1st and acted in the consummation of this transaction, must account for this \$15,000 by causing the same to be returned to the treasury of the company.

An undivided one-half interest in this property had been bought by Town in 1911 before he became a director of the corporation. There is no evidence which controverts his testimony that in June, 1916, long before the deal with the Lansing syndicate was under consideration, it was fairly worth \$15,000. The trial judge concluded that he should account for the value of the stock at the time it was transferred, which he found to be \$22,250. We find no sufficient evidence to support this finding, and conclude that he should account for that which the stockholders would have received had he been paid in cash and that is the sum of \$15,000.

The bill of complaint alleges that certain other moneys received by the defendant Town should be charged to him, and prays for a general accounting. This was denied by the trial judge. We have read the record carefully and find there is one other item for which he should account. His agreement with the Lansing syndicate stated the total stock issue of the car company to be 15,500 shares. As a matter of fact, after the issue to him of the 1,500 shares in payment of the real estate, there still lacked $212\frac{1}{2}$ shares to make this number. These were issued to Town at their par value, and charged to his account with the company. As they were worth to him at the time of such issue double their par value, he should account to the company for such extra value, \$2,125.

The proof as to other items lacks clearness and is not discussed by counsel in a way to throw much light upon them. They were carried as a credit to Town on the company's books and were a part of the indebtedness which was assumed and paid by the truck company on the transfer. The trial judge, who heard the witnesses and gave these matters due consideration, concluded that it was not in the interest of the stockholders to have the litigation prolonged by a further accounting. With this conclusion we agree.

Except as modified by this opinion, the decree will stand affirmed. A decree may be prepared granting relief to plaintiffs in conformity with this opinion. The plaintiffs will recover taxable costs against the defendants. All other expenses and attorney fees when determined by the trial court shall be paid out of the treasury of the car company before distribution.

STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred with BIRD, C. J.

MOORE, J. (*dissenting*). I agree with most of the conclusions of the Chief Justice in this case; but I think he is wrong in deciding that Mr. Town should account to the stockholders for the \$25,000 turned over to Mr. Robinson. The inference from this record is irresistible that the persons who furnished this money did so with the distinct understanding that it was to go to Mr. Robinson, and their understanding of the matter was given effect. Mr. Town should account for what has enured to his personal benefit while acting in a fiduciary capacity, but he ought not to be penalized because of his so acting.

I think the trial judge is quite right in deciding that it would not be equitable or just to compel Mr. Town to turn over what he did not receive. In that respect his decree should be affirmed.

SHARPE, J., did not sit.

ON APPLICATION FOR REHEARING.

PER CURIAM. The application recently filed in this cause for a rehearing has called our attention to an omission in the opinion filed. By inadvertence, a paragraph was omitted therefrom. The opinion will now be amended by adding the following:

The decree will provide that the bill of complaint will be treated as amended by making the Duplex

Power Car Company a defendant herein. The amount found due by the several defendants will be paid by them to the treasurer of said company and will be disbursed by him to the stockholders entitled thereto at the time of the transfer of the assets of the car company to the truck company on the order of the judge of the circuit court for the county of Eaton, in chancery, subject, however, to the payment of expenses and attorney fees provided for in said decree and any indebtedness of said car company which said judge may find to be a first lien thereon. For the purpose of carrying out this direction, the record will be remanded.

Except as herein amended, the motion for a rehearing is denied.

BOLLSTROM v. DUPLEX POWER CAR CO.

1. CORPORATIONS—STOCK AND STOCKHOLDERS—FRAUD AND DECEIT.

Plaintiff's claim that he was induced to surrender to the corporation certain shares of its stock held by him by reason of the false and fraudulent representations of defendant stockholders, *held*, not sustained by the record.

2. SAME—SALE OF STOCK—EQUITABLE OWNER ENTITLED TO MAINTAIN SUIT FOR FRAUD IN SALE.

In equitable proceedings against the secretary of a corporation and certain of its stockholders to recover the difference in value of shares of stock between the amount paid by defendants and the true value, charging that defendant secretary misrepresented the true value, where it appears that plaintiff had always been treated on the books of the corporation as the owner of the stock, and the

On liability of officer of corporation for fraudulent representation which induced another member to sell his stock, see note in 1 L. R. A. (N. S.) 258.

secretary had so reported a short time before, although plaintiff had been in the habit of transferring same from time to time to persons to whom he was indebted, *held*, that plaintiff was the equitable owner of the stock and entitled to maintain this suit although he was present when the sale of the stock was made and recognized another, to whom he had transferred it as security, as the owner.

3. SAME—SALE OF STOCK—ESTOPPEL—FRAUD AND DECEIT.

Although plaintiff would be estopped from disaffirming the sale of said stock, he is entitled to maintain this suit to recover for the fraud of defendant secretary in misrepresenting its value.

4. SAME—FRAUD AND DECEIT—EVIDENCE—PROOF.

Testimony reviewed, and *held*, to conclusively establish the fact that at the time of the sale of said stock defendant secretary knew of the completion of a deal whereby the assets of the corporation were to be taken over by another corporation and its stock was to be taken at double its par value in cash or stock of the new corporation.

5. SAME—FRAUD AND DECEIT—WITHHOLDING SECRET INFORMATION—FALSE REPRESENTATIONS.

Representations by defendant to plaintiff, upon which the latter relied, that he was getting a fair value for his stock, and that he was making a good bargain in selling it at par, although defendant possessed secret information at the time that it was worth double the par value, *held*, to conclusively show that defendant secured said stock by fraud and deception, and that plaintiff was damaged thereby.

6. SAME—STOCK AND STOCKHOLDERS—SALE OF STOCK.

Plaintiff, by this action having affirmed the sale of his stock, would not be entitled to share in the benefits derived by the stockholders at the time of the sale of its assets to another corporation under a decree of the court in another suit.

Appeal from Eaton; Smith (Clement), J. Submitted November 5, 1919. (Docket No. 98.) Decided December 22, 1919.

Bill by Maurice Bollstrom against the Duplex Power Car Company and others for an accounting. From a

decree dismissing the bill, plaintiff appeals. Reversed, and decree entered.

Elmer N. Peters (Frank A. Dean and Claude J. Marshall, of counsel), for plaintiff.

Roslyn L. Sowers, Colgrove & Potter and Burritt Hamilton, for defendants.

SHARPE, J. The Duplex Power Car Company was organized in 1909, and exercised its corporate powers until its assets were sold to the Duplex Truck Company on November 20, 1916. There has been much litigation relative to its affairs. The facts in this case will be better understood by a reference to the cases which have been considered by this court: *Hill v. Town*, 172 Mich. 508 (42 L. R. A. [N. S.] 799); *Town v. Duplex Power Car Co.*, 172 Mich. 519; *Toles v. Duplex Power Car Co.*, 202 Mich. 224; and *Garber v. Town*, ante, 1.

The plaintiff was one of the patentees of the device for a 4-wheel drive which distinguishes the truck that the company manufactured; 2,500 shares of stock were allotted to him for his interest in the patent. Previous to February 21, 1913, he had by transfer reduced his holding to 1,743 shares. A suit had been brought by some Chicago parties to whom stock had been sold and the plaintiff made a party thereto. This had been settled by the defendant *Town*, who was then a stockholder in the same corporation. At a stockholders' meeting, held on April 21, 1913, at which plaintiff was present, the record shows the following:

"Mr. *Town* as attorney in fact for the stockholders reported that he had effected a settlement with the defendants whereby upon the payment by him of the sum of fourteen thousand (\$14,000.00) dollars they had assigned to him for the benefit of the complainant stockholders 6,885 shares of stock, together with the

mortgage held by Farlin H. Ball, as trustee, and all claims they might have against the company.

"Mr. Town reported that the expenses incurred in consequence of litigation, receivership and maintenance would approximate about ten thousand (\$10,000.00) dollars, and that while there was sufficient assets, if properly handled, to take care of this indebtedness, yet in his opinion the \$10,000.00 expenses should be taken care of by the sale of stock to those who had pledged to pay their *pro rata* of this expense.

"Moved by R. A. Garber, supported by Brown, that complainant stockholders be asked to subscribe as much more stock as they now held, to liquidate these expenses, for which a double amount to that subscribed be issued them.

"Carried unanimously.

"Mr. M. Bollstrom stated that it would be impossible for him to pay for his quota of stock, and after some discussion he offered to shrink his stock back to the complainant stockholders, to pay his *pro rata* of litigation and maintenance expenses.

"On motion duly made his proposition was unanimously accepted."

Agreeably to such proceedings, plaintiff surrendered 582 shares of his stock to the corporation, and the other stockholders took additional stock as provided for in the minutes of such meeting. It is now the claim of the plaintiff that he was induced to make such surrender by the false and fraudulent representations of the defendant stockholders and that this transfer on his part should be set aside. We consider this claim at this time as it is entirely disconnected with the other questions presented. In disposing of it, the trial judge said:

"Without going into this claim with specific exactness, but passing on, it is only necessary to state that it is the judgment of the court that the plaintiff has entirely failed to establish any fraud practiced upon him as to that settlement, or any wrong done to him in that matter. He was not asked to do more than he ought as matters then stood, and he did not do more

than he ought. Relief under this claim as asked for by plaintiff cannot and should not be granted."

We have carefully read the testimony on which plaintiff relies. The value of the stock at that time was problematical, and, as plaintiff attended many meetings thereafter, being for a part of the time a director, and in no way questioned the good faith of the transaction until he filed the bill of complaint in this cause on March 21, 1917, we are content with the conclusion reached by the trial judge relative thereto. *Lewless v. Railway Co.*, 65 Mich. 292, 303.

The stock involved in the litigation referred to (6,885 shares) was transferred to the defendant Town as trustee and for some time thereafter voted by him as such. At the meeting held on April 21st, a board of directors was elected which included the defendant Town, and at a directors' meeting, held on the same day, he was elected president of the corporation. It appears from the allegations in the bill of complaint, supported by the proofs, that thereafter Mr. Town was not only the executive head of the corporation but practically in charge and control of all its affairs.

In the summer of 1916, it became apparent that additional capital was needed to make the business a success. In September and October, an effort was made to interest certain Detroit and New York parties.

In October, 1916, Town began negotiations with Louis Rowley, of Lansing, for the sale of the property of the corporation to certain parties living in that city. This deal was practically consummated on or about the 24th day of that month, though not reduced to writing until the 30th. On that day, Mr. Town entered into a written contract with Harry M. Lee and eight other Lansing citizens, who will hereafter be spoken of as the Lansing syndicate, for the transfer to such syndicate, when formally organized into a

corporation, of "all the property, franchises, rights, privileges, assets and good will of the Duplex Power Car Company of Charlotte, Michigan, and all its patents or rights in patents by license or otherwise."

Town represented that there were outstanding 15,500 shares of stock in the car company, of a par value of \$10 each, and the Lansing syndicate agreed to pay to the holders of such stock two shares of stock in the corporation to be formed by them for each share so held in the car company, or, at their option, \$20 per share for such stock, being double the par value thereof, and to assume and pay all obligations and indebtedness of the car company. At the same time, the following agreement was entered into and signed by Mr. Town and all of the members of the Lansing syndicate:

"This agreement, made this 30th day of October, 1916, between Frank P. Town of Charlotte, Michigan, party of the first part, and Harry M. Lee, G. W. Hewitt, Harry F. Harper, Elgin Mifflin, W. H. Porter, E. S. Porter, J. Edward Roe, James H. Robinson and H. E. Bradner, all of Lansing, Michigan, parties of the second part, witnesseth as follows:

"Whereas, the parties of the second part purpose and intend to organize a corporation for the manufacture and sale of motor power trucks, and it is their purpose and desire when said company is organized, to purchase all the property, franchises, rights, privileges, assets and good will of the Duplex Power Car Company of Charlotte, Michigan, and all its patents or rights in patents by license or otherwise; and

"Whereas, the party of the first part agrees to acquire possession and control of not less than three-fourths of the outstanding stock of the said Duplex Power Car Company, and that when he so acquires the same, he shall deposit the same with some bank in Charlotte agreeable to second parties with proxies if so desired. First party also agrees that when he acquires such stock he shall use the same and its voting power either personally or by proper proxies to cause and procure a sale and transfer of all the prop-

erty, franchises, patents, rights in patents, as aforesaid, business, good will, rights and privileges of the said Duplex Power Car Company to a corporation to be hereafter organized by the parties of the second part. Said new corporation to assume and pay all the debts and obligations of whatever nature of said Duplex Power Car Company.

"It is agreed by second parties that in consideration and on condition that the said Town shall acquire said stock of said company aforesaid, and shall use or cause the same to be used to procure or secure the sale and transfer of all of the property, rights and assets of the said Power Company as aforesaid, to said corporation to be hereafter organized by second parties, that said second parties will pay to the said first party at the option of said first party \$75,000 in cash or an equal amount of the par value of the stock of said new corporation to be organized by second parties. Said money to be paid or said stock delivered within ten days after said new corporation is organized and said transfer made to it by said Duplex Power Car Company.

"It is agreed that this agreement shall not be binding upon any of the parties hereto until all of the parties named herein have signed the same."

Both of these agreements were afterwards fully performed according to their terms. The \$75,000 provided for in the latter was paid to Mr. Town.

The defendant Murray had been a director and secretary of the car company since February, 1915. On October 27, 1916, Dr. George Toles, of Charlotte, went to Murray for the purpose of purchasing some stock in the corporation. He gave him his check for \$100 as down payment on 1,000 shares. Within half an hour thereafter, Murray informed Town by telephone and Town said to him that there was a deal on and no stock for sale. There was subsequently some personal talk between them that afternoon.

A certificate had been issued to plaintiff for his 1,161 shares on August 6, 1913. This he had assigned

as security from time to time, but it had not been sent in for transfer until in October, 1915, when Mrs. E. E. Thompson, plaintiff's sister, so sent it to the defendant Murray. No such transfer was made. On September 11, 1916, she wrote Mr. Murray asking for the new certificate. The transfer was not made, and on October 21st she mailed to the corporation a written assignment of the stock to H. G. Wurst, a brother-in-law of plaintiff, and asked that the certificate be mailed to him. Plaintiff claims that he had theretofore on several occasions asked that his certificate be canceled and several smaller ones issued to him in its stead. This was not done. The original certificate, with the assignment of Mrs. Thompson indorsed thereon, was in defendant Murray's hands as secretary of the company on October 27, 1916. Plaintiff had on several occasions stated, and had in fact testified in certain legal proceedings, that he was not the owner of this stock. Differences had existed between him and Town, and perhaps some of the other directors. Town had theretofore secured a personal judgment against plaintiff.

On the morning of October 28, 1916, Murray went to Battle Creek to get in touch with plaintiff. His purpose was to secure an option on the 1,161 shares of stock. Not finding plaintiff on that day, he went there again on the 29th, and again on the 31st, at which time he met plaintiff. He inquired about Wurst, whom he knew to be the brother-in-law of plaintiff, and plaintiff brought them together at his home. After some negotiations, an attorney was employed by Murray and an assignment made by Wurst to Murray in which Wurst warranted that he was then the owner of the stock. An option was prepared and signed by Wurst, giving Murray the right to purchase the 1,161 shares for \$10 per share at any time within 15 days thereafter. Fifty dollars advance payment was made

thereon. The plaintiff participated in the negotiations leading up to the assignment and option, and was present when they were signed. Wurst insisted on his being satisfied with the deal as finally made. The option and assignment were left in a bank at Battle Creek and were taken up by Murray within the 15 days. The certificate was canceled and a new certificate issued therefor to Murray on November 18, 1916. On the same day, this certificate was canceled and one issued to each of the defendant directors, except Town, for 50 shares, and one to each of two employees of the company for 25 shares each. These Murray testified were a gift on his part, no consideration having passed to him therefor. For the remaining shares, a new certificate was issued to Murray. All of these certificates were turned in to the truck company.

Plaintiff in this suit seeks to recover the difference between the amount paid under the option and the value of these shares as turned in to the truck company. He claims that he was then the equitable owner of the stock and that Murray secured it in fraud of his rights as a stockholder.

The defendants filed a joint answer. They deny the right of plaintiff to maintain this suit for the reason that he had parted with his title to the stock. They deny that Murray had any knowledge of the deal with the Lansing syndicate, or in any way deceived plaintiff or Wurst in the purchase he made, and allege this stock was purchased because plaintiff was a disturbing factor in the affairs of the corporation, and claim that the option and purchase thereunder were made in the usual way, without any intent to gain an advantage over either plaintiff or Wurst. They admit that defendant Town assisted Murray in securing the money to pay for this stock by indorsing his note, and also admit that Murray distributed the shares thus purchased by him as before stated.

Further facts will be stated in the discussion of the questions presented.

The trial court rendered a decree dismissing the bill, holding, as to this claim, that the deal by which Murray purchased the stock was a fair one and that as plaintiff had parted with his stock he was not a stockholder and had no standing in court in such a proceeding. From the decree rendered, plaintiff appeals.

There can be no question under the proofs but that plaintiff has always been the equitable owner of this stock. He made transfers to persons to whom he was indebted as security, and, at the time Murray procured the option on it, Wurst held it as security for an indebtedness of \$250. The testimony of plaintiff as given on this trial and in a proceeding before Judge North at Battle Creek shows him to be an eccentric individual, very talkative, and not so careful in his statements as he might well have been. Notwithstanding the assignments of which the officers of the company had theretofore had notice, and of the fact that the certificate of stock assigned to E. E. Thompson was in the hands of the secretary at the time, the annual report, made as of August 31, 1916, and sworn to by the defendant Murray as secretary on October 30, 1916, listed this stock as belonging to plaintiff. The testimony (hereafter quoted) of both plaintiff and Wurst as to the statements made by Murray during the negotiation for the option clearly indicate that Murray then knew that the stock was the property of the plaintiff. We do not attach much importance to the expressions of warranty in Wurst's assignment to Murray. Its purpose was evidently to secure a good and indefeasible title to the stock.

As before stated, plaintiff was unquestionably the equitable owner of the 1,161 shares, subject only to the lien of Wurst thereon for \$250. He permitted

Wurst to represent himself to be the owner thereof and to sell it to Murray. Were he now seeking to attack the validity of such transfer, he would clearly be estopped from doing so. He is, however, affirming the sale, not seeking to set it aside. His claim is that as he was then the owner of the stock, subject to Wurst's lien thereon, Wurst acted as his agent in transferring it and he ratified such action. After the transfer was completed, he claims to have discovered that he had been defrauded by the action of Murray in securing the stock at one-half its value. He seeks to recover for this fraud, not by disaffirming the contract but in reliance on it. This, either he or Wurst clearly had a right to do. As is said in 20 Cyc. at page 86:

"An action of deceit to recover damages for fraud inducing the making of a contract is not based upon the contract but upon the tort. The action proceeds upon the theory of an affirmation of the contract alleged to have been fraudulently procured."

While this right of action is included in equitable causes for which plaintiff seeks to recover in this suit, the prayer as to this is that the defendants do pay to the plaintiff the difference between the amount paid by Murray and its value at the time of its purchase. Wurst received the amount due him out of the payment made by Murray on the option and had no further interest in the stock or in the transaction. Counsel for defendants say:

"No matter from what angle plaintiff's conduct is viewed, he is clearly estopped from asserting title or ownership to the stock sold to Mr. Murray."

The argument of counsel and authorities cited on this question are largely in support of the claim as stated. As has been observed, plaintiff is not claiming title to the stock. He affirms the sale and admits that title passed to Murray. But he insists that fraud

was practiced by Murray on Wurst and himself in securing such title, and, as a result of such fraud, he, and not Wurst, has been damaged. To such a claim, the doctrine of estoppel has no application. The gist of such a defense is thus stated:

"There can be no estoppel unless a party is misled to his prejudice by the one against whom it is set up, and does material acts relying upon conduct well calculated to mislead him." *Murray v. Rugg*, 116 Mich. 519.

"It is the well-settled rule in regard to estoppels *in pais* that the conduct complained of must have induced another to act to his disadvantage, and that his situation in consequence thereof has changed." *Gooding v. Underwood*, 89 Mich. 187.

We fail to see, nor do counsel point out, in what way Murray has been prejudiced by the failure of plaintiff to assert his ownership of the stock at the time the option was given by Wurst. That Bollstrom is the plaintiff in this suit in no way enhances the damages or affects any defense defendants might set up. We therefore conclude that plaintiff was entitled to bring this action.

Had Murray knowledge of the fact that Town had closed the deal with the Lansing syndicate at the time he secured the option from Wurst? Both he and Town testified that he had not. Plaintiff claims that the circumstances surrounding the transaction lead to the conclusion that he had. We have read the record with care. There is no positive proof to sustain plaintiff's claim, but it is the duty of the court to weigh the testimony and draw a fair and reasonable inference from what was done and said in reference to it.

After Town secured the assignment of the stock from the Chicago parties to himself as trustee in 1913, he voted it at all meetings of the stockholders and thereby practically controlled the election of the board of directors. While president, he exercised not only

the duties of that office but of all the others as well. The money of the corporation was kept in his name in the bank. The negotiations with the New York and Detroit parties in September and October, 1916, were carried on by him alone, but Murray admits that he knew about it and saw the correspondence. The relations between Town and Murray were apparently very cordial and confidential, and, while Town might have believed it best to conceal from Murray his negotiations with Mr. Rowley, there was no reason for concealment after the deal was concluded between the Lansing syndicate and himself. He closed this deal with Rowley on October 27th, though it was not reduced to writing until the 30th. On the 27th, Murray telephoned to him about the Toles purchase and was told that there was a deal on and no stock for sale. Murray could not well have understood this to refer to the deals with the Detroit or New York parties, as he already knew about them. Soon after, he saw Town and talked with him. Both deny that anything was said about the deal with the Lansing syndicate, though it was in effect closed at that time. The next day Murray went to Battle Creek to secure plaintiff's stock. Not having seen him, he went again on the 29th. He states as a reason for not going on the 30th that that was Sunday. The calendar shows he was mistaken in this, but it is significant that on that day, the 30th, the contract between Town and the Lansing syndicate was executed at Charlotte. On the next day Murray drove to Battle Creek in his car, reaching there about 8 o'clock in the morning. He admits that before leaving Charlotte he spoke to Town about helping him to get the money to buy the stock. While the deal for plaintiff's stock was pending in Battle Creek, Murray called up Town and read a paper to him. They both claim that it was not the option but the assignment of the stock certificate. They both admit that Town told

Murray about the Lansing deal on the next day, November 1st. The question naturally occurs, If Town felt at liberty to tell about it on November 1st why would he not have informed Murray about it on the 31st when he knew Murray was trying to buy plaintiff's stock? On October 31, 1916, the day after the agreement with the Lansing syndicate was made, Town wrote to K. F. Ranger, who was a stockholder in the company, the following letter:

"There are some changes being contemplated in the Duplex and no doubt in taking in more capital, our interests will be somewhat influenced by the new additional capital and it is proposed that we make settlement most satisfactory to ourselves in the way of cash for our stock, or stock in the new organization which no doubt will be the result of the change.

"If you will inform me what you desire for your stock by return mail or if you desire to take stock in the new organization please so state, and you will greatly oblige. Please inform me at your earliest convenience as we can get a good price for our stock at this time no doubt and by stating what you desire for yours, we can then govern ourselves accordingly."

The money to pay for plaintiff's stock was secured by a loan, for which Town indorsed Murray's note to the bank. When Murray got the stock, he issued new certificates therefor, as before stated, and out of the proceeds he paid the judgment Town had theretofore secured against plaintiff.

Under the rule as to the weight to be given to circumstantial evidence, can these facts, all of which are admitted by Murray or are established beyond question, be true and it be said that he had no such knowledge? We cannot believe that any jury would so conclude, nor can we do so. We feel constrained to hold that at the time Murray secured the option from Wurst he knew all about the contract which Town had entered into relative to the sale of the assets of the company to the Lansing syndicate.

Did Murray commit a fraud upon plaintiff by not informing either him or Wurst about it? It is the claim of the defendants that though Murray was an officer of the corporation and stood in a fiduciary relation to it, he occupied no such relation to the individual stockholders and was under no obligation to advise the plaintiff as to any information he possessed relative to the value of the stock. Attention is called to the language of Justice GRANT in *Walsh v. Goulden*, 130 Mich. 531, at page 539:

"Directors, of course, stand in a fiduciary relation to the corporation itself. They do not stand in that relation, however, when dealing with other stockholders for the purchase or sale of stock. In the purchase and sale of stock between stockholders there must be some actual misrepresentation in order to constitute fraud. Mere silence is not sufficient. The books of the corporation are open to all stockholders alike, and each may inform himself of the condition of the company."

Counsel also cite 2 Thompson on Corporations (2d Ed.), § 1419; 8 Thompson on Corporations (2d Ed.), § 1419; 2 Machen on Corporations, § 1637; 1 Cook on Corporations (7th Ed.), § 320.

The reason for the rule thus stated is clearly summarized in the closing part of the quotation:

"The books of the corporation are open to all stockholders alike, and each may inform himself of the condition of the company."

As applied to a going concern, whose records reveal the book value of the stock, and the good will and intangible assets of which are presumably as well known to one stockholder as another, there may be no hardship in so holding. But the proofs in this case present a different situation. The affairs of the corporation had not been prosperous for several years. Mr. Town testified that in 1913 one could not sell the

stock "for ten cents on the dollar." While the negotiations at Battle Creek were pending, Wurst testified:

"A. On the way down to the bank I says, 'How is business over there?' 'Why,' he says, 'It is pretty good.' He says, 'It ain't as good as it ought to be, or as good as it can be made.' He says, 'They don't seem to just manage the thing right to make it go successfully.'

"Q. Did he make any statement as to whom he was purchasing this stock for?

"A. He says—that was at the time he wanted the twenty-day option, he says, 'I have got a chance now to get the money for Maurice. Maurice and me have been pretty good friends, I always like Maurice well. I have got a chance now to get this money for him. A relative of mine from Ohio wants to take this stock over.'

"Q. Did he say anything about the value of the stock, whether that price he was paying was a fair price—a good price?

"A. Yes, sir, that that was a good price. He says, 'It ain't every day that you can sell stock at par.'"

It is apparent that Bollstrom's suspicions were aroused when Murray approached him to buy this stock. His relations with Town had not been friendly, and he knew that Town was the dominating power in the board of directors. He testified as to his conversation when he first met Murray on the 31st:

"He was waiting in his car on the street near our home in the morning, the approximate time that I expected to go down town between seven and eight in the morning. He hailed me. I did not play up to him very strong. He says, 'I am not going to hurt you, I am here to do you good. I am a friend of yours. I have always been a friend of yours.' He asked me about the stock and I did not give a direct answer. I asked him what he wanted and he said he knew where that stock could be disposed of, and I asked him who wanted it. He said that didn't cut any figure who wanted it, if I wanted to sell it. I said something about liking to deal with a person direct and told him to let me know who wanted it, and I would

look into it, and he said that could not be done because he had to make a deal that day or not at all, the deal would be all off. He just had that little time. I asked him how that was, or words to that effect. He said it was some out of town people that nobody knew any way, saying it did not matter if I wanted to dispose of it who it was, and I said I was going to know. He said it was a relative in Ohio. I knew he had relatives there and asked if they had the money. * * * I asked how much they wanted to pay for the stock and he asked how much I would take. I said I would have to look into it and the conversation along that line went on. He suggested par and I expressed doubts because I did not get a clear explanation of what I wanted to find out. I expressed doubt whether I could get Mr. Wurst in that length of time. I was told it would be a very fine thing for me, again reiterating his friendship and I suggested they might put in writing what they would do and he said that could not be done because the deal had to be concluded that day or there would not be anything done. He said par might be paid, and I said I would see."

These statements were denied by Murray, but on cross-examination he testified:

"A. I told them I thought I was paying enough for it.

"Q. In other words you told this man there at that time that you were paying them what you considered to be a good price for that stock?

"A. Yes, sir.

"Q. A fair price, and all it was worth?

"A. Yes, sir, I did so consider it.

"Q. You told them that was your opinion, didn't you?

"A. Yes, sir."

He further testified:

"Q. Did you tell them a syllable about it?

"A. Yes, there was something said about a deal; Mr. Bollstrom asked about the deal, asked what was doing, I didn't know what to tell him. There wasn't anything to tell him. * * *

"Q." He asked you a question and you didn't answer it?

"A. Yes, I answered it, there was not anything particular doing that I knew of."

And again:

"I don't recollect Bollstrom asking me in whose interest I was there. I did not tell him I had some people, relatives in Ohio, that would like to get this stock. My recollection there was no reference made at all to any one in Ohio that would like to buy this stock. I might have said something, but cannot remember, but don't think I said that."

Mr. Murray at this time was a director and secretary of the company in which plaintiff was, in equity, a stockholder. As such officer, he had information, not accessible to the stockholders generally from the records, that plaintiff's stock was worth double its par value. He did talk about it and assured plaintiff and Wurst that they were making a good bargain in selling, getting a fair value for their stock. While, under the authorities on which defendants' counsel rely, he might have remained silent and declined to advise with them about the value of the stock or the fairness of the deal, the statements which he did make were an inducement to them to sell the stock to him were false in fact, and known by him to be so, and must be held to have been relied on by plaintiff. Any less stringent rule would place it in the power of an officer of a corporation to take advantage of a condition known only to him, and of which the records would afford no information, by which the value of the stock had been greatly enhanced, and, by an assurance to the stockholder that the price offered was a fair one, secure to himself the shares of that stockholder at a price grossly inadequate, in view of the information possessed by him. We think the facts in this case bring it squarely within the rule laid down in *Strong v. Repide*, 213 U.

S. 419 (29 Sup. Ct. Rep. 521). In that case the president of a corporation purchased stock at much less than its par value as known to him and due to conditions unknown to the stockholders. The court said:

"If it were conceded, for the purpose of the argument, that the ordinary relations between directors and shareholders in a business corporation are not of such a fiduciary nature as to make it the duty of a director to disclose to a shareholder the general knowledge which he may possess regarding the value of the shares of the company before he purchases any from a shareholder, yet there are cases where, by reason of the special facts, such duty exists. The supreme courts of Kansas and of Georgia have held the relationship existed in the cases before those courts because of the special facts which took them out of the general rule, and that under those facts the director could not purchase from the shareholder his shares without informing him of the facts which affected their value."

After a review of the facts, the court concluded:

"If under all these facts he purchased the stock from the plaintiff, the law would indeed be impotent if the sale could not be set aside or the defendant cast in damages for his fraud."

Judge Peckham, who wrote the opinion, cites *Stewart v. Harris*, 69 Kan. 498 (77 Pac. 277, 66 L. R. A. 261, 2 Ann. Cas. 873); *Oliver v. Oliver*, 118 Ga. 362 (45 S. E. 232). These cases are very instructive on the general proposition here presented.

We cannot but conclude that Murray secured this stock by fraud and deception, and that plaintiff was damaged thereby. The amount of such damage was the difference between the sum Murray paid for the stock and its value at the time it was turned in to the Duplex Truck Company. The plaintiff is entitled to recover such amount from the defendant Murray.

The bill of complaint also contains in substance many of the allegations in the bill filed by Rolandus

A. Garber and others against Frank P. Town and the other individual defendants herein, praying for an accounting against Town and the other defendants as therein set forth. By this action the plaintiff has affirmed the sale of the 1,161 shares of stock to Murray. He is therefore not entitled to share in the benefits derived by the stockholders at the time of the sale to the truck company under the decree in that case.

The decree of the trial court dismissing the bill of complaint will be reversed and one entered in this court in conformity with this opinion. The plaintiff will recover costs of both courts against the defendant Murray.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

GUNDICK v. GUNDICK.

1. DIVORCE—ALIMONY—DECREE—AMENDMENT—GENERAL RULE—EXCEPTION—STATUTE.

Except as modified by 3 Comp. Laws 1915, § 11408, it is the rule in this State that a decree for permanent alimony containing no reservation of the power of modification cannot be altered after the expiration of the time within which an appeal may be perfected.

2. SAME—DECREE—AMENDMENT—JUSTIFICATION.

Where the court below, on motion of the husband, after expiration of the time for perfecting an appeal, modified the decree for alimony by changing the wife's undivided interest in the homestead to a money interest, which

action has no justification on the record under said statute, it was without authority and will be set aside by the appellate court.

3. SAME—SETTING ASIDE AMENDED DECREE—SHOWING—ABUSE OF DISCRETION.

Even if the court had authority to amend the decree, *held*, that, on the uncontroverted showing made by the wife, on her motion to set it aside, the failure of the court to do so clearly amounted to an abuse of discretion.

4. SAME—APPEAL AND ERROR—FINAL ORDER.

An order denying defendant's motion to set aside an amended decree, being one finally disposing of the controversy, is appealable.

5. SAME—DESCRIPTION OF PREMISES IN DECREE—POWER OF COURT TO AMEND.

The court below, having power to amend the decree by correcting the description of the premises therein, that part of the decree so amending said description will be affirmed.

Appeal from Wayne; Brennan (Fred W.), J., presiding. Submitted October 14, 1919. (Docket No. 44.) Decided December 22, 1919.

Bill by Albert Gundick against Martha Gundick for a divorce. Defendant filed a cross-bill asking for a divorce. From an order denying a motion to set aside an amended decree for defendant, she appeals. Reversed.

William C. Gottman, for plaintiff.

Samuel W. Shier, for defendant.

BIRD, C. J. This is a divorce proceeding in which the defendant was granted a decree of divorce on her cross-bill. She was awarded the household furniture and an undivided one-half interest in a land contract, which had constituted their homestead, and of which she had possession. The purchase price of the prem-

ises was \$2,800, upon which they had paid \$1,100. The decree was filed April 18, 1919. On May 12th, upon motion of plaintiff's solicitor, the decree was amended by the trial court. As amended, it divested defendant of her interest in the land contract and provided that upon payment to her of \$555 plaintiff should be entitled to an assignment of her interest therein, and that if she refused to accept the money and make an assignment the money should be deposited with the clerk of the court, and the decree should operate as an assignment of her interest. The recitals in the amended decree show the reasons for amending the original decree:

"It duly appearing to the court that there are errors apparent upon the face of the decree heretofore entered, the same having been incorrectly drafted, and it further appearing that the property given to the said Albert Gundick and Martha Gundick jointly and left to be divided between them is both misdescribed in the decree and is liable to be lost because of a threatened forfeiture of the land contract by Albert Eastman, the titleholder thereof, and the attorney for the said Albert Gundick having a purchaser ready to pay sufficient to give them each \$555 for their respective contract interests, therefore, etc."

The description of the premises was also amended to show the particular block in which they were situate.

Several days after the amended decree was filed defendant learned of it and at once informed her solicitor that she was opposed to its terms and instructed him to protect her interests. Her solicitor making no move to this end, she employed another solicitor, and a motion was filed on June 17th to set aside the amended decree for various reasons, principally because it was inequitable and a fraud upon her rights. The showing in support of the motion included the affidavit of defendant, which shows:

(a) That she had no knowledge of the amended de-

cree until several days after it was entered and filed, that she was not advised that any such step was contemplated, and that her solicitor neither advised her of the motion nor consulted her about it prior to its being heard. She further shows that her interest in the premises is worth in excess of \$555, and that she expended several hundred dollars thereon during the time the divorce proceedings were pending, and that she is desirous of acquiring the entire interest in said property. She further shows that after the original decree was granted her solicitor endeavored to purchase her interest in the property for \$150. That she refused to sell for that price, and that he then offered her \$250, and after the amended decree was made he urged her to accept the \$555 and remove therefrom.

(b) It is shown by the affidavit of Mr. Eastman, the title owner of the premises, that he never threatened to forfeit the contract, but on the contrary had assured defendant he would assist her in purchasing plaintiff's interest therein, after the proceedings were ended.

(c) It is shown by the affidavit of her present solicitor that he had searched the files and records of court and that no motion or petition to amend the decree is in the files of said court, and neither is there any calendar entry of the filing of the motion to amend said decree.

This motion was heard on July 12th and denied, whereupon defendant appealed to this court. Later plaintiff's counsel filed a motion to dismiss the appeal on the ground that the order was not an appealable one. Action on this motion was postponed until the decision of the case.

1. The rule with reference to the modification of decrees for alimony is stated as follows:

"A decree for permanent alimony is subject to modification because of fraud or mistake in the same man-

ner and under the same circumstances as other decrees. The general rule would seem to be that where the divorce is absolute a decree for permanent alimony containing no reservation of the power of modification cannot be altered after the expiration of the time within which an appeal may be perfected." 14 Cyc. p. 784.

And the reason of the rule is that the jurisdiction of the court over the subject-matter of the suit and of the parties terminates with the entry of a final judgment except as to proceedings for its enforcement or for the correction of mistakes in the record. *Walker v. Walker*, 155 N. Y. 77 (49 N. E. 663).

In *Perkins v. Perkins*, 12 Mich. 456, an application was made to amend a decree for alimony in a similar way. The trial court granted the amendment but this court set it aside, and, in doing so, said in part:

"The only ground stated in the petition for changing the decree is, that defendant did not know, at the time it was made, that complainant would be entitled to dower in his real estate. If defendant was dissatisfied with the decree, he should have appealed; and not having done so the error, if there be one, cannot be corrected, *after the time for appealing has expired*, by petition under the statute."

In *Reynolds v. Reynolds*, 115 Mich. 378, a like attempt was made to amend a decree for alimony by making it a lien upon the defendant's property. This was held to be irregular.

The record in the present case does not show that any notice of appeal had been filed and no claim is made to that effect, and at the time the amended decree was filed it was too late to file such notice of appeal. 3 Comp. Laws 1915, § 13754. The only exception to this rule that we are aware of is the statute which provides that the circuit court, in chancery, may revise and alter decrees in divorce cases on petition of either of the parties. 3 Comp. Laws 1915, § 11408.

The record gives no evidence that this action was taken in reliance upon this statute but even if it were there was no showing which would justify the action of the court under that statute. *Perkins v. Perkins, supra*; *Reynolds v. Reynolds, supra*. We must, therefore, conclude that the trial court exceeded its authority when it amended the decree in matters of substance by converting her interest in her home to a money interest.

But aside from the question of lack of authority we think defendant's motion should have been granted. When it appeared, without contradiction, that the proceedings to amend the decree had been taken without defendant's knowledge and consent, and that she had been thereby divested of her interest in her homestead upon a petition or motion which was in the air instead of in the files, when it appeared that the chancellor's impression concerning the danger of the contract being forfeited was erroneous, and when it appeared that defendant's solicitor had been recreant to his trust, the court should have promptly set aside the amended decree and given her an opportunity to secure other counsel and be heard upon the question of the value of the land and her ability to take care of the indebtedness. The failure to do so upon the part of the court was clearly an abuse of discretion.

The question is raised as to whether the order denying defendant's request to set aside the decree is an appealable order. The order made by the trial court was one finally disposing of the controversy and was conclusive in dispossessing defendant of valuable rights. Under these circumstances we entertain no doubt as to defendant's right to have the order reviewed by this court. *Michigan Insurance Co. v. Whittemore*, 12 Mich. 311; *Tucker v. Stone*, 92 Mich. 298. In the latter case a petition was filed in the trial court to correct the final decree. The prayer of the

petition was denied. An appeal was taken, followed by a motion to dismiss on the ground that the order was not an appealable one. This court denied the motion to dismiss, saying:

"Complainant moves to dismiss the appeal on the ground, *first*, that it is not a final order. There is no doubt that this is a final order. See *Webber v. Randall*, 89 Mich. 531, and cases cited; *Kingsbury v. Kingsbury*, 20 Mich. 215. This order finally closed the case as against the defendant. It was held in *Michigan Insurance Co. v. Whittemore*, 12 Mich. 311, that an order refusing to set aside a decree for irregularity was a final order and appealable."

Our conclusion is that the amended decree must be set aside except that portion thereof which corrects the description of the premises in the original decree. It was within the power of the court to make this correction and as to that part of the order the amended decree will be affirmed. The motion to dismiss will be denied and defendant will recover costs of the appeal in both courts, and also costs on the motion in both courts.

SHARPE, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

MALONEY v. WEBBER.

JUSTICES OF THE PEACE—JURISDICTION—TRESPASS TO LANDS—CERTIFYING CAUSE TO CIRCUIT COURT.

In an action in justice's court for trespass on certain real estate owned in fee by the plaintiffs, where defendants pleaded the general issue and gave notice of justification under authority by plaintiffs to defendants' employer to use the same, and on the trial admitted plaintiffs' title, the justice had jurisdiction to try said cause; 3 Comp. Laws 1915, § 14237, providing that where plaintiff's title shall not be admitted by defendant the justice shall certify the cause to the circuit court, etc., not being applicable.

Case-made from Kent; Brown (William B.), J. Submitted October 15, 1919. (Docket No. 55.) Decided December 22, 1919. Rehearing denied January 28, 1920.

Case in justice's court by Anna Maloney and another against Arthur Webber and another for trespass upon land. There was judgment for defendants, and plaintiffs appealed to the circuit court by writ of certiorari. Judgment for defendants. Plaintiffs appeal. Affirmed.

Ellis & Ellis, for appellants.

Cornelius Hoffius and *Fred P. Geib*, for appellees.

BIRD, C. J. Defendants appeared in justice's court in response to a civil warrant to answer a charge of trespass on certain real estate owned in fee by the plaintiffs. Defendants pleaded the general issue and gave notice thereunder, as follows:

"Please take notice that under the general issue the defendants will justify the acts complained of on the ground that they were employees of the Kent county

road commission, which commission was authorized by plaintiff to use the premises in question, and that defendants were using it in pursuance of and by virtue of such authority."

Upon the trial defendants admitted that plaintiffs had title to the land described in the declaration. They showed, under objection of plaintiff's counsel, that they were employees of the board of county road commissioners. They offered testimony tending to show that in December, 1916, the chairman of the board had secured from plaintiffs the right to use a portion of the land in question during the years 1917, 1918 and 1919, for a railway sidetrack, to aid in a nearby road construction, for a consideration of \$100, and that the same had been used for such purpose without protest or hindrance during the season of 1917 and 1918, up to the time of their arrest.

Plaintiffs' counsel objected strenuously to the admission of this testimony, claiming that it raised a question of title; that if defendants desired to contest plaintiffs' title they should proceed under section 14237 of the Compiled Laws of 1915, but the objections were overruled by the justice and later judgment was rendered for the defendants. Plaintiffs then removed the proceedings to the circuit court by certiorari, where the same contentions were made and the same result was reached. The section of the statute referred to provides that:

"If it appear on the trial from the plaintiff's own showing that the title to lands is in question, which title shall not be admitted by the defendant, the justice shall, without further proceeding, certify the cause and paper to the circuit court of the county where the same shall be tried." * * * 3 Comp. Laws 1915, § 14237.

This section does not appear to be applicable as defendants conceded from the beginning, and now con-

cede, that plaintiffs have the title to the premises. Under the express terms of the statute it is only when the defendants refuse to admit the title of the plaintiff that there is any necessity for certifying the case to the circuit court. In other words, it is only when the title is in dispute that this section is applicable. *Ostrum v. Potter*, 71 Mich. 44. In the case cited it was observed that:

"It was not the design of the legislature to confer upon justices' courts jurisdiction to try titles to lands, and they have provided a way, in actions for trespass or other actions where the damages claimed fall within the jurisdiction of the court, where the title to land may be involved, for a trial to be had before the justice, namely, where the title claimed is admitted."

Owing to the discussion between counsel and the court over the question whether title was in issue the precise contention of plaintiffs on the merits was somewhat obscured. But whether their claim was that defendants had no permission to go upon and use the land, or were using land not included in the permission granted, is not of much importance, as the justice had jurisdiction in either event, under defendants' concession concerning the title. We think no further discussion of the case is necessary.

The judgment of the circuit court is affirmed.

SHARPE, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

PEOPLE v. LUPU.

1. CRIMINAL LAW—RAPE—ASSAULT WITH INTENT TO COMMIT THE CRIME OF RAPE—SIMPLE ASSAULT.

In a prosecution for statutory rape, the defendant may be convicted of rape, of assault with intent to commit the crime of rape, or of simple assault.

2. SAME—TRIAL—INSTRUCTIONS AS TO LESSER OFFENSE.

In such prosecution, where the trial judge instructed the jury that if they did not find defendant guilty of rape they might find him guilty of assault, and advised them as to what conduct would constitute an assault, but did not advise them that they could convict him of an assault with intent to commit the crime of rape nor as to what conduct would constitute that offense, a conviction thereof will be set aside, on error.

3. SAME—LESSER OFFENSE—DISTINCTION.

Failure of the trial court to explain to the jury the distinction between simple assault and assault with intent to commit the crime of rape, *held*, prejudicial.

Error to recorder's court of Detroit; Jeffries, J. Submitted October 16, 1919. (Docket No. 111.) Decided December 22, 1919.

Alexander Lupu was convicted of an assault with intent to commit rape, and sentenced to imprisonment for not less than one nor more than ten years in the Detroit house of correction. Reversed.

William Look, for appellant.

Alex. J. Groesbeck, Attorney General, *Matthew H. Bishop*, Prosecuting Attorney, and *Herman H. Greenberg*, Assistant Prosecuting Attorney, for the people.

BIRD, C. J. Respondent was informed against in

the recorder's court of the city of Detroit for having committed the crime of statutory rape. After considering the proofs placed before them, the jury adjudged him guilty of an assault with intent to commit the crime of rape. Several errors are assigned by counsel in his behalf on the court proceedings, which led to his conviction. The important one and the one which must control the disposition of the case was the failure of the trial court to advise the jury what conduct would constitute an assault with intent to commit the crime of rape. The jury were charged that:

"If you do not find him guilty of rape beyond a reasonable doubt, gentlemen of the jury, as charged in the information, you may find him guilty of an assault, if you believe him guilty of that beyond a reasonable doubt.

"An assault is an offer or attempt, by violence, to do a corporal hurt to another, coupled with the present means or ability to carry it into effect."

It was said in *People v. Courier*, 79 Mich. 366:

"Under an information charging carnal knowledge and abuse of a female child under the age of 14 years, the accused may be convicted of an assault with intent to commit that offense, or of simple assault."

In commenting upon this case in *People v. Abbott*, 97 Mich. 484 (37 Am. St. Rep. 360), where a like question was raised, the court said:

"In this case it was a question for the jury, under the evidence in the case, to determine whether the respondent was guilty of rape, of assault with intent to commit that crime, or of simple assault; and the court should have directed them what constitutes the lesser offenses, and that they might convict on either of these lesser offenses"—citing *Hall v. People*, 47 Mich. 636.

See, also, *People v. Durham*, 170 Mich. 598.

In the present case the trial court left it to the jury to determine whether the respondent was guilty of

rape, and they were further instructed that if they did not find him guilty of that offense they might convict him of an assault, and they were advised what conduct would constitute an assault, but they were not advised that they could convict the respondent of an assault with intent to commit the crime of rape, nor was it explained to them what conduct would constitute that offense. It may be said, however, in this case that the court's failure to instruct the jury that they might convict the respondent of an assault with intent to commit the crime of rape was not prejudicial, inasmuch as they convicted him of the lesser offense, but the difficulty is they did so without being instructed what elements would constitute that offense. The average jury would not be supposed to know without being instructed what elements would constitute the lesser offense. Had the distinction between a simple assault and an assault with intent to commit the crime of rape been explained to the jury, they might have reached a different conclusion than they did. For this reason the judgment of conviction must be set aside and a new trial ordered.

SHARPE, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

Kyselka v. Northern Assurance Co. of Michigan.

ACTION—SPLITTING CAUSE OF ACTION—INSURANCE—RECOVERY OF RENEWAL COMMISSIONS BEFORE ACCRUAL.

The Supreme Court in a former decision (194 Mich. 430) having limited plaintiff's recovery of commissions on renewals of life insurance, under his contract with defendant, to such commissions as had accrued and were payable at the time he started such suit, since the amount was uncertain and could only be determined after the expiration of the period, defendant's contention in this suit for commissions accruing subsequent to the former suit, that plaintiff should have included this demand in the former suit, and that the law will not allow him to split his cause of action into two or more suits, *held*, untenable.

Error to Grand Traverse; Mayne (Frederick W.), J. Submitted October 17, 1919. (Docket No. 78.)
Decided December 22, 1919.

Assumpsit by Albert G. Kyselka against the Northern Assurance Company of Michigan for breach of an agency contract. Judgment for plaintiff. Defendant brings error. Affirmed.

Fred H. Aldrich, for appellant.

Patchin & Duncan, for appellee.

BIRD, C. J. Plaintiff sued defendant and recovered in the trial court a judgment for \$1,328.11 for certain commissions on renewals of life insurance which he had theretofore solicited for defendant while in its employ. The defense made by defendant is that this claim for commissions was disposed of by a former adjudication between the parties, and that the trial

court was in error in refusing to so instruct the jury. It appears that plaintiff entered into a written contract with defendant on April 6, 1910, whereby he was to become its agent for the purpose of soliciting insurance; that he continued to work under this contract until September 1, 1914, when he was discharged by the president of defendant on a charge of insubordination. His contract contained the following provision:

"After three consecutive years' service in the employ of the company under this contract, should the said second party resign his connection with the company under this contract, he shall receive renewal commissions as above for as many years thereafter as he has been in the employ of the company hereunder, provided that paid-for insurance of at least \$300,000 has been written by the agency during the first three years of this contract, beginning April 6, 1910."

Following his discharge he brought suit and recovered his renewal commissions up to August 3, 1915. That case came to this court and is reported in 194 Mich. 430, where a very full statement of the controversy is made. The present suit was begun to recover his renewal commissions from August 3, 1915, to April 19, 1917. It is argued by defendant that the former suit disposed of the claims made in this suit; that plaintiff should have included in the former suit a count for prospective commissions, but having failed to do so, the loss is his, as the law will not permit him to split his cause of action into two or more suits.

Defendant's counsel is inclined to discuss the case from the standpoint of the ordinary case of hiring followed by a wrongful discharge. Of course, in such a case the servant may institute suit at once and recover for a breach of his contract, or he may wait until the end of the contract period and recover what he has lost by reason of the wrongful discharge. 1 R. C. L. p. 355. But this is not such a case. Plaintiff

is not seeking to recover damages for a breach of his contract, nor is he seeking to recover wages which would have accrued had there been no breach of the contract, but he is seeking to recover certain commissions which the contract provides he shall be entitled to after the termination of his contract, or after the period of employment is passed. Under the contract, these commissions are due and payable quarterly, and until the end of the quarter the amount of the commissions is uncertain and they are not demandable until the end of the period. In the former suit plaintiff was permitted to recover in the trial court commissions for the quarter period ending September 1, 1915. This court held that was error, saying:

"We think the court was in error in entering a judgment in favor of the plaintiff for a full year's renewal. As before pointed out, the declaration was filed on August 3, 1915, and the last quarter was not payable under the terms of the contract until September 1, 1915. Under the declaration plaintiff could recover only such payments on account of renewals as were had at the time he started his suit."

We are of the opinion that plaintiff's present suit is not open to the objection that he should have included in the former suit a demand which was at the time uncertain in amount and one which was not due and payable until a later date. 23 Cyc. p. 443; 1 R. C. L. p. 351.

Taking this view of the matter the judgment of the trial court must be affirmed.

SHARPE, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

208—Mich.—4.

SPITZLEY v. GARRISON.

1. JUDGMENT—ISSUES RAISED—APPEAL—ENTITLED TO JUDGMENT OF APPELLATE COURT.

Where plaintiffs appealed to the Supreme Court from the decision of the chancellor on several distinct issues adjudicated by him, they were entitled to the judgment of this court upon each question raised.

2. SAME—REHEARING—DENIAL—RES JUDICATA.

Where the decision of the Supreme Court was expressly confined to one of the questions raised, and plaintiffs moved for a rehearing, challenging the court's attention to the undetermined questions, and the rehearing was denied, *held*, that such denial must be construed as settling said questions adversely to plaintiffs.

Appeal from Wayne; Hosmer (George S.), J. Submitted October 7, 1919. (Docket No. 1.) Decided December 22, 1919.

Bill by Henry Spitzley and another against Earl D. Garrison and others to set aside a sale on execution, and for an accounting. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Prentis & Mulford, for plaintiffs.

Walker & Spalding, for defendants.

BIRD, C. J. This litigation had its beginning in a suit brought by plaintiffs in 1904 against John W. Garrison, the father of defendant Earl D. Garrison, and one Rivard, to recover on certain promissory notes made by Rivard and indorsed by Garrison. The litigation lasted for some time, it finally being concluded in April, 1909, in favor of plaintiffs. In October, 1905, and while the foregoing suit was pending, Fran-

ces Nolan, the mother of John W. Garrison, brought suit against her son to obtain a reconveyance of lots 4 and 5, situate at the northwest corner of Woodward and Baltimore avenues, in the city of Detroit, on the ground that they belonged to her, she claiming that they were conveyed to her son as a matter of convenience in managing her property interests while she was absent from the State. At the conclusion of this litigation she was declared to be the owner thereof and a decree was made ordering a reconveyance. It was also decreed that she was entitled to recover from the said John W. Garrison the sum of \$23,611.11, on account of the rents therefrom which he had collected and failed to turn over. This decree was afterwards reviewed by this court and affirmed. *Nolan v. Garrison*, 151 Mich. 138. After the last-mentioned case was decided but before its conclusion in this court, Frances Nolan caused a levy to be made on an estate in remainder which John W. Garrison owned in certain property at the corner of Cass and Jefferson avenues, and in which she had a life estate, for the purpose of satisfying her money decree. The same was sold at execution sale and bid in by her for the sum of \$8,000. After the sale, she sold one-half of the fee thereof to defendants Lasiers and Hubbard and they subsequently mortgaged the same to defendant Harper Hospital, incorporated.

In June, 1911, the plaintiffs filed a bill against Frances Nolan and made the other defendants herein parties defendant, alleging in substance:

(1) That the title to lots 4 and 5 at the corner of Baltimore and Woodward avenues was in John W. Garrison, that he was the real owner thereof, and that the decree which the mother obtained ordering a reconveyance of these lots was fraudulently obtained.

(2) That even if said lots 4 and 5 did not actually belong to John W. Garrison, the mother permitted the title thereof to stand in his name, and he obtained

credit on the strength thereof, and that she should be estopped, as against the creditors of John W. Garrison, in claiming that the property was hers.

(3) That the execution sale to satisfy the money decree of Mrs. Nolan on the Cass and Jefferson avenue property was invalid for the reason that John W. Garrison was, at the time, mentally incompetent to manage and care for his property, and was under guardianship.

(4) That defendant trust company had funds which it held in trust belonging to the estate of John W. Garrison, which should be applied to plaintiffs' judgment.

The defendants in this suit answered and the foregoing claims were made contested issues in the case. The case was heard by Honorable George S. Hosmer of the Wayne circuit court, and he made a holding upon each one of these propositions. His conclusions will be found in the opinion of Mr. Justice KUHN, which is reported as *Spitzley v. Garrison*, 201 Mich. at page 363. The conclusion of the chancellor was that plaintiffs were not entitled to recover, and he, therefore, dismissed their bill. The matter was then presented to this court and was affirmed, the affirmance being placed upon one ground only. In this connection the opinion says:

"After an exhaustive examination of this very voluminous record, we are well satisfied that a decision of the case may very well rest upon the second point, to wit: That there is no evidence upon which the court might properly conclude that the decree in the case of *Nolan v. Garrison*, 151 Mich. 138, which was affirmed by this court, was obtained by fraud and collusion."

Following the affirmance of the decision by this court an application for a rehearing was made by plaintiffs in which the attention of this court was called to the fact that while it had disposed of propositions (one) and (two), involving the fraud as to

the Woodward and Baltimore avenue lots, it had not determined the other questions, namely: The validity of the execution sale and the determination as to whether the Detroit Trust Company had trust funds in its hands belonging to John W. Garrison. This application was subsequently denied.

Plaintiffs then filed the bill in this case in which they set up substantially the same matters that were set up in the first bill, omitting the charges of fraud with reference to the Woodward and Baltimore avenue property, and insisting and asking for a determination of the questions as to whether the execution sale was a valid one and whether the defendant trust company held trust funds belonging to John W. Garrison estate. Defendants answered this bill claiming, among other things, that those questions had been determined by the former litigation, and when the case came on for hearing, upon motion of defendants' counsel, a preliminary hearing was held under Circuit Court Rule No. 25, resulting in a holding by the chancellor that the former case was *res judicata* of the issues in the present one, and the bill was dismissed. Plaintiffs are in this court again insisting that the undetermined questions raised by the former case, and which are again raised in this case, should be determined by this court.

It is argued by defendants that these questions were all in issue in the former case, that they were contested and adjudicated in the trial court, and that while this court, on appeal, placed its decision upon only one ground, there was subsequently filed an application for a rehearing, and the court's attention was challenged to the undetermined questions. That notwithstanding this the court denied the application and, therefore, the whole case was disposed of adversely to plaintiffs' contentions.

The following rule has been laid down for testing

the question as to whether a matter of law or fact was *res judicata*:

"A matter or question, either of law or fact, is *res judicata*, or set at rest, as to adverse parties and their respective privies, if it was a material issue in the proceeding, directly involved, and not merely incidentally cognizable nor collaterally in question, and was adjudicated after a contest, by final judgment on the merits." 1 Van Fleet's Former Adjudication, p. 2, approved in *LeRoy v. Collins*, 165 Mich. 380.

It appears to be conceded that the questions of the validity of the execution sale and the question affecting the trust company were in issue and were material issues in the trial court, and that they were adjudicated after a contest by a final judgment on the merits. Therefore, we must conclude that the adjudication in the trial court was full and final upon all of the material questions raised. But can it be said that there was an adjudication of these undetermined questions in this court? The decision in this court was expressly confined to the one question, and that was the question of fraud. The questions of fraud were distinct, having no such relation to the other questions as that a decision thereon would affect the remaining questions. The questions were squarely raised and plaintiffs were entitled to the judgment of this court on each one of them. Thus far we think plaintiffs' contention is right. But following this an application for a rehearing was made and this court's attention was expressly challenged to those undetermined questions, and after a consideration thereof the application for rehearing was denied. This can be construed in no other reasonable way than that this court refused to give plaintiffs any relief upon those undetermined questions. It is quite possible that it would have been better had we written something upon the denial of the application for rehearing, but in the hurry of the work it was not done. We think

the denial of the application for rehearing must be construed as settling the two questions in controversy adversely to plaintiffs' contention.

The view taken by the chancellor must be sustained and the decree affirmed. No question of practice is involved.

SHARPE, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

ZIMMERMAN v. MAY. 1

**PROCESS—SUMMARY PROCEEDINGS—SUBSTITUTED SERVICE—TIME—
CIRCUIT COURT COMMISSIONER—JURISDICTION.**

A summons in summary proceedings issued by a circuit court commissioner and served by the officer by substituted service on defendant the day before the time of appearance did not confer jurisdiction upon the commissioner, since the statute (3 Comp. Laws 1915, § 13243) requiring the service to be made two days before the time of appearance applies as well to substituted as to personal service.

Certiorari by Fred C. Zimmerman and another against Samuel L. May, circuit court commissioner of Wayne county, to review an order denying a motion to dismiss summary proceedings for want of proper service. Submitted October 9, 1919. (Docket No. 22.) Decided December 22, 1919.

Rood & Visscher, for plaintiffs.

BIRD, C. J. Plaintiffs applied to and obtained from this court a writ of certiorari to review certain summary proceedings pending before defendant commissioner in the county of Wayne, in which they were made defendants. The questions raised are directed at the jurisdiction of the commissioner. The summons was issued by the commissioner on February 6, 1919, and made returnable February 11th. The return of the officer discloses the manner and time of service:

"I was not able to find the within named defendant in Wayne county, after diligent search and inquiry. I served the within summons on defendant on the 10th day of February, A. D. 1919, in the city of Detroit, in said county, by leaving a copy thereof entitled as such by me at the defendant's usual place of abode, with Charles C. Wirth, a person of suitable age and discretion, to whom I read the same and explained the contents thereof."

The principal point made against the service is that the summons was not served within the time provided by law. The statute which directs the manner of service in such cases is as follows:

"The officer to whom such summons shall be delivered shall serve the same at least two days before the time of appearance mentioned therein, by delivering to the defendant, if to be found within the county, a copy thereof, but if the defendant shall not be found, it shall be served by leaving such copy at the usual place of abode of such defendant, in the presence of some person of suitable age who shall be informed of its contents." 3 Comp. Laws 1915, § 13243.

Upon motion of plaintiffs the commissioner refused to dismiss the writ. It was his opinion that that part of the section which provides for a substituted service is not qualified by the portion which commands the service to be made at least two days before the time of the appearance.

We are of the opinion that the commissioner was in error in so interpreting the statute. The language of the section clearly indicates that it was the intention of the legislature that parties defendant who were personally served should have two full days' notice to prepare before the day of appearance, and we think it is equally clear from the wording of the statute that the legislature intended that a person upon whom substituted service was had should have the same notice before the time of appearance. It would, indeed, be an unreasonable conclusion to reach that the legislature intended a defendant upon whom personal service was had should be entitled to two days' notice in which to prepare to attend court, and that one who might be temporarily absent from his home should be entitled to less notice, especially since the latter would need more time ordinarily than a person to whose attention the summons was directly called. This service did not confer jurisdiction on the commissioner and should have been dismissed in response to plaintiffs' motion.

The judgment will be vacated, with costs of both courts to plaintiffs in this suit to be taxed against the plaintiffs in the summary proceedings.

SHARPE, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

PEOPLE, for Use of RYAN, v. BOYES.

1. EVIDENCE—ORAL TESTIMONY—WRITTEN CONTRACTS.

Oral testimony, *held*, admissible to show the intent of the parties to a subcontract in writing, where uncertainty existed as to whether a certain item of work specified in the original contract was covered by the subcontract, the latter referring to the original contract, incorporating part thereof, but omitting other important parts.

2. TRIAL—PROOF—INSTRUCTIONS.

Where defendant submitted no proof as to the cost of a certain item of work which he had a right to charge to plaintiff's account, the trial court was not in error in withdrawing same from the consideration of the jury.

3. NEW TRIAL—APPEAL AND ERROR—PRACTICE.

Reasons which might have been presented to the trial court on a motion for a new trial cannot be considered by this court, on error, where no such motion was made.

Error to Kent; Perkins (Willis B.), J. Submitted October 23, 1919. (Docket No. 51.) Decided December 22, 1919.

Assumpsit by the people of the State of Michigan, for the use and benefit of Otis H. Ryan, against David W. Boyes and others on a contract for excavating for a water main. Judgment for plaintiff. Defendants bring error. Affirmed.

Charles A. Watt, Ganson Taggart, and Henry T. Heald, for appellants.

Smedley & Linsey, for appellee.

SHARPE, J. On May 10, 1915, the defendant Boyes entered into a contract with the city of Grand Rapids, in which he agreed to install a water main in said city

On admissibility of parol evidence to show intention of parties to written contract, see note in 17 L. R. A. 273.

for a distance of about two miles. Bids had been asked for this work, which was to be done in conformity with plans, specifications and blue prints, made a part of the contract. While a lump sum in payment was fixed in the contract, it was arrived at by computing a number of items which comprised the bids on the labor and material required in executing the work contemplated in the contract. In this contract Boyes agreed "to do all work and furnish all materials for laying a high pressure water main from water works pumping station, to Michigan street," according to the plans, specifications and drawings theretofore adopted by the board of public works of said city, which were made a part of the contract. The work included the digging of a trench for a 30-inch pipe and installing the pipe therein from Michigan street to a point designated as "Zero" on the drawings. From this point to the pumping station, a 48-inch pipe was to be installed. This particular work was described in the proposal as follows:

"Item 10-A.—For building and installing complete all cast iron pipe and specials, valves and brick masonry necessary to connect the 30-inch pipe to the discharge line at the pumping station, including excavation and back filling, replacing gravel and brick roadways, removing, replacing and cutting existing pipe lines and all incidental labor and materials, the sum of seven hundred dollars and no cents (\$700.00) lump sum."

For this item, 109 feet in length, a lump sum of \$700 had been bid by Boyes. For excavating for the trenches along the rest of the line, he was to receive 69 cents per lineal foot, except where rock was encountered, for which his agreed compensation was \$4 per cubic yard. There was a provision for extra excavating, which will be hereafter referred to. The work was to be commenced within ten days after the

signing of the contract and to be completed on or before December 1, 1915; the time of beginning, rate of progress and time of completion being essential conditions of the contract. The board of public works was given the right, in case it appeared that the contractor was dilatory or did not employ sufficient force, to place additional men and teams on the work and render such assistance as it deemed advisable for the completion of the contract within the time fixed therefor, and charge the expenses thereof to the contractor.

Boyes subsequently associated the defendant Fitzpatrick with him as a partner, and they sublet a part of this work to the plaintiff by a contract entered into on May 17, 1915. This contract reads as follows:

"These articles of agreement, made this 17th day of May, A. D. 1915, by and between D. W. Boyes and James R. Fitzpatrick, of Grand Rapids, Michigan, party of the first part, and O. H. Ryan of Grand Rapids, Michigan, party of the second part,

"Witnesseth: In connection with the installation of that contract known as the East End Water Main contract extending from the city pumping station, at Coldbrook, Monroe and Ottawa streets to the intersection at Michigan avenue and Diamond street.

"The party of the second part agrees to perform the following work: Do all excavating, leaving ditch in a suitable condition to install pipe, valves, fittings, etc., excepting as hereinafter noted; all back filling, removing surplus excavation, removing all gravel where directed, carefully, and place to one side.

"The party of the second part agrees to remove dirt from ditch to subgrade after ditch has been refilled and leave same for replacing of gravel. Party of the second part agrees to put gravel back in the ditch if same can be put back with teams and scrapers, excess excavation to be loaded and hauled away.

"Party of the second part will put all pipe, valves and fittings into the ditch and handle same until bell and spigot ends are properly placed together (by party of the first part), remove all surplus material from streets after job is completed, excavate all rock.

"At creek crossing excavation will be done up to the walls of the bridges, pipe, etc., handled and swung over the sides of the bridge. The excavation in the creek and other work necessary will not be done by the party of the second part. At railroad crossings where tracks are removed, excavation, back filling, etc., will be done as heretofore mentioned. Where tracks are not removed excavating and loading will be done by parties of the first part, but the excavated material will be hauled and re-hauled by party of the second part. This provision applies to all work at street crossings.

"All underground work, if any, in the line of the ditch or within the four feet in the nature of water pipe, gas pipe, laterals, telephone service, or any underground wiring will be taken care of by the party of the first part (without expense to the party of the second part), unless damaged by the party of the second part. If anything is disturbed outside of line of ditch or outside of the four feet by the party of the second part, same will be taken care of by the party of the second part.

"All gravel excavated will be saved and stored if desired by the party of the first part.

"The party of the second part agrees to begin work within fifteen (15) days and have same completed not later than November 1st, A. D. 1915.

"The party of the first part agrees to pay the party of the second part at the rate of fifty-five (55) cents per lineal foot of ditch for all material excavated.

"For rock excavation the party of the first part agrees to pay to party of the second part four dollars (\$4.00) per cubic yard.

"The party of the second part in performing his work agrees to do so in entire accordance with plans and specifications and under the direction of the engineer.

"The party of the second part can shore ditch at his discretion, unless shoring is required by the engineer.

"The party of the second part agrees to furnish to the party of the first part satisfactory surety bonds, the same as the first party furnished the city of Grand Rapids, namely, the sum of 25% of value of the con-

tract. These bonds to be by a surety company or by two acceptable individuals.

"The terms of payment are as follows:

"Party of the second part to be paid 85% of work performed up to the time of the preparation of each estimate and to be paid his *pro rata* share out of each estimate received by the party of the first part."

The meritorious question presented is whether or not plaintiff's contract included the excavation work between the point designated as "Zero" on the drawings and the pumping station, a distance, as before stated, of 109 feet, and particularly described in "Item 10-A." The plaintiff was somewhat delayed in his work, and the defendants Boyes and Fitzpatrick did all of the work under this item and also in extending the 30-inch main from "Zero" easterly for 361 feet. They seek to charge the plaintiff with the expense of this work, and, while he admits a liability for the 361 feet easterly of "Zero," he denies that any part of the work required to be done in "Item 10-A" was included in his contract. The defendants kept no separate account of the cost of the work done by them under "Item 10-A" from that done easterly of point "Zero."

The trial judge admitted, over defendants' objection, parol evidence tending to show the intent of the parties with reference to this item, and submitted the matter to the jury to determine whether the work in dispute was intended to be included in plaintiff's contract. He also instructed the jury that if they did not so find they should not consider the cost incurred by defendants for the work done easterly from point "Zero" as there was no proof submitted on which they could in any way base a division of the entire cost of the work by defendants at the west end of the job. The plaintiff had verdict and judgment for \$3,709.69, and defendants appeal.

There are many assignments of error, but the defendants discuss them all under two heads:

First. Whether it should have been left to the jury to construe this contract on account of its ambiguity or uncertainty, and,

Second. Should the defendants lose their entire set-off (or practically all of it) through the confusion of the accounts.

1. Counsel insist that the words used in the written contract defining the work to be done by plaintiff are in no sense ambiguous or uncertain, and that the intent of the parties as expressed therein must govern. It thus becomes necessary to determine the undertaking of plaintiff in his contract, of which, as before stated, the contract of Boyes with the city and the proposal, plans, specifications and drawings form a part.

Boyes' contract with the city, under the heading, "Work Contemplated," provided:

"First. The contractor agrees to do all work and furnish all materials for laying a high pressure water main from water works pumping station, to Michigan streets,—Contract No. 1,—and do all the incidental work connected therewith and furnish all tools and materials for such work and such incidental work in the manner and under the conditions and requirements as described in the foregoing specifications and the accompanying drawings; which specifications and drawings have been approved and adopted by the board of public works of said city, and, together with all drawings and regulations referred to in such specifications and this contract as illustrating or describing any device used in the work, or details thereof, are hereby made a part of this contract."

The first paragraph of the general specifications prepared by the city officials, and under the heading, "Work Contemplated," provides:

"The work contemplated under this contract in the following specifications and plans accompanying same consists in excavating for and installing a 30-inch, high pressure, trunk-line water main from the water works pumping station * * * to Michigan street."

This in itself is somewhat contradictory of that part of the contract just quoted and of other portions of the specifications in that the 30-inch main was only to extend to the point marked "Zero" on the drawings. The main, as before stated, west of that point to the water works pumping station, was to be 48 inches. Sixty paragraphs in the specifications are employed to point out with particularity the work to be done in laying this 30-inch main. Then follows "Item 10-A," under the heading, "Installation at the Pumping Station," and there are seven paragraphs in which the manner of doing this work is particularly stated.

Turning now to plaintiff's contract with defendants, we find that the first paragraph thereof discloses the fact that the allusion therein to defendant Boyes' contract with the city may well be said to have been inserted for the purpose of thereafter defining the work to be done by plaintiff as a subcontractor thereunder; that, in effect, this paragraph provides that the plaintiff agrees to do a part of the work which Boyes contracted to do in "the installation of that contract known as the East End Water Main contract, extending from the city pumping station * * * to the intersection of Michigan avenue and Diamond street."

In the succeeding paragraphs, so far as material to the matter now being considered, plaintiff agrees:

1. To do all the excavating of a ditch for the installation of the pipes.
2. To replace the earth removed after the pipes are installed.
3. To place the pipes, etc., in the ditch and handle the same until connected.

As bearing on defendants' claim that plaintiff agreed to do all the excavating required by defendants' contract with the city, let us examine "Item 3-A" of defendants' proposal. It reads as follows:

"Item 3-A.—For excavating one hundred (100) cu-

bic yards, more or less, and back filling with suitable material as specified, including transporting, placing and removing cofferdams, bracing, sheathing, pumping and all other incidental work, the sum of two dollars and no cents (\$2.00) per cubic yard."

In the specifications, this item is explained at length :

"Item No. 3-A.—Extra Excavation and Back Filling. Extent.—

"25. Whenever it is necessary in the judgment of the engineer to excavate to an extra depth below the elevations indicated on the plans such excavations shall be made. It is the intention to excavate to such depth as found necessary to obtain suitable foundations for the structure.

"Refilling.—

"26. When such excavations are made by the order of the engineer refilling shall be made with good earth or gravel placed in thin layers and thoroughly tamped with the same quality of earth or gravel and placed in the same manner as was specified under Item No. 1-A.

"Measurement and Compensation.—

"27. Extra excavation will be measured by the cubic yard for the volume actually placed as required. The price bid per cubic yard under this item shall cover all labor, tools, and appurtenances, including draining and bracing required to excavate materials and refilling with gravel."

There is no such provision in plaintiff's contract. Could it be fairly claimed that if such extra excavation and back filling had been required to be done as is provided for in this item, and for which Boyes was to be paid by the cubic yard, plaintiff must do it under his contract, for which he was paid by the lineal foot? A consideration of the several provisions of the contracts to which attention has been called leads us to the conclusion that there is uncertainty as to whether or not plaintiff's contract covered the excavating to

be done by Boyes under "Item 10-A." The reasons therefor may be thus summarized:

(a) The language employed in the first paragraph of plaintiff's contract may well be claimed to have been used only for the purpose of describing the particular contract of Boyes with the city, of which plaintiff was agreeing to do a part of the work.

(b) In the proposal of defendant Boyes for excavating for the 30-inch main, he bid a fixed sum per lineal foot, and an inference may be drawn therefrom that plaintiff, whose compensation for excavating was for a less sum per lineal foot than that bid by Boyes, was only intended to do like excavating.

(c) No provision was made for extra payment to plaintiff should he be required to do the extra excavating required by "Item 3-A," thereby inferentially leading to the conclusion that the excavating to be done by him was only that for which Boyes was to be paid by the lineal foot.

(d) The word "ditch" used in plaintiff's contract may have been intended to be used in the same sense as the word "trench" in Boyes' contract, and not intended to cover the wide excavation required under the work in "Item 10-A."

(e) The work to be done under "Item 10-A" is specifically described and not included in the specifications relative to excavating, and the bid therefor was a lump sum.

The claim of the defendants that it is the duty of the court, and not the jury, to construe a written contract is elemental. But, having concluded, as did the trial judge, that the obligation of the plaintiff to do the excavating under "Item 10-A" was doubtful, the right to admit oral proof tending to show the construction the parties themselves put on their several obligations and also to show the real intent of the parties as to the matter in dispute is not open to question under the decisions of this court. In *Brown v. A. F. Bartlett & Co.*, 201 Mich. 268, the authorities are collected and discussed at length. At page 277, it is said:

"For plaintiff it is denied that the testimony complained of is an attempt to contradict the plain provisions of the written agreement, but its legitimate purpose is to supplement the same, make clear apparent inconsistencies and show in what sense the parties themselves understood and used uncertain and ambiguous words or phrases. The rule invoked upon that proposition is thus well stated in 17 Cyc. p. 682:

"Where any doubt arises as to the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument, for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party. In this case parol evidence is admissible *ex necessitate*."

2. It was exceedingly unfortunate that the defendants did not offer any proof as to the cost of the excavating done by them east of point "Zero," a distance of 361 feet. Plaintiff concedes this would have been a proper item of set-off. We cannot consider the claim of surprise or mistake on defendants' part relative to it. We can only determine whether or not there was error committed by the trial court. There was no proof offered from which the jury could determine the cost of this work. This was conceded by defendants' counsel when the matter was under discussion on the trial when he said: "There is no earthly way of telling about the different work done." There was consequently no error in the withdrawal of this item from the consideration of the jury. The reasons now urged might have been presented on a motion for a new trial, but none was made and they cannot be considered by us.

The judgment will be affirmed, with costs to plaintiff.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

SULLIVAN v. FIDELITY & CASUALTY CO. OF NEW YORK.**1. PRINCIPAL AND SURETY—LIABILITY OF SUBCONTRACTOR'S SURETY TO PRINCIPALS FOR LIENS UNDER THEIR CONTRACT.**

The surety on two separate bonds of a subcontractor, given to indemnify the principals for any loss accruing to them under their contracts, is liable for the amount of a judgment secured against them jointly on their bonds for labor liens by an employee of said subcontractor; no separate account of the work done under each subcontract having been kept.

2. SAME—ACTION—JOINING SEPARATE CLAIMS—SEPARATE PROOF.

In an action by one of the principals on his own account and as assignee of the claim of the other to recover the amount of said judgment, which they had apportioned between themselves, from the surety of the subcontractor, he had the right, under 3 Comp. Laws 1915, § 12309, to join both claims, nor was it necessary for him to make proof under each claim as though separate suits had been brought.

3. SAME—MISCARRIAGE OF JUSTICE—STATUTE.

Even if proof of damages in each claim should have been made separately, it is not reversible error under 3 Comp. Laws 1915, § 13763, since it in no way increased defendant surety's liability, and therefore cannot be said to have resulted in a miscarriage of justice.

4. SAME—RELEASE OF SURETY—WEIGHT OF EVIDENCE.

Testimony supporting defendant surety's contention that it was released because defendant subcontractor was paid more than 80 per cent. on completed work in violation of the terms of his contract, *held*, not so conclusive as to justify setting aside the verdict of the jury.

Error to Shiawassee; Collins (Joseph H.), J. Submitted October 30, 1919. (Docket No. 59.) Decided December 22, 1919. Affirmed on rehearing June 7, 1920. See 210 Mich. 625.

Assumpsit by James Sullivan against the Fidelity

& Casualty Company of New York, surety, and Arthur L. Waldorf, principal, on a bond. Judgment for plaintiff. Defendant surety brings error. Affirmed.

Cummins & Nichols, for appellant.

Pulver & Bush, for appellee.

SHARPE, J. On February 8, 1917, plaintiff entered into a contract with the Shiawassee county board of road commissioners to construct 3½ miles of gravel road in that county. Under it the contractor agreed to build a gravel road "in strict conformity with the specifications hereto attached and the plans herein referred to, all of which are made a part of this agreement." The specifications provided that the contractor "shall furnish all materials, tools, machinery and labor necessary for * * * finishing the roadway complete in every respect." They also provided that bids for the work must be made on blanks furnished by the board and must be accompanied by a certified check for \$100, payable to the board,—

"conditioned that if the contract shall be awarded to the bidder he will when required by said board execute an agreement in writing to perform the work according to the specifications therefor, accompanied by good and sufficient bonds, one guaranteeing the faithful performance of the work in accordance with the terms of the contract, and the other guaranteeing the payment of all indebtedness incurred for labor, materials, or any cause whatsoever on account of this contract. It being expressly understood that the bond given to guarantee the payment of indebtedness is also to include any liability of the said party of the second part arising from the provisions of Act No. 10 of the Public Acts of Michigan, 1912 (Extra Session), as passed, or thereafter amended and occurring through the execution of the work under this contract."

On February 19, 1917, Warren W. Doan entered into

a similar contract with the board for the construction of $3\frac{1}{2}$ miles of road, one mile north of that to be constructed by plaintiff. Both Sullivan and Doan furnished the bonds required by the provision above quoted, one known as the "construction bond," conditioned for the due performance of the contract, and the other known as the "lien bond," conditioned for the payment of all indebtedness which might arise to any subcontractor or laborer or material man in the performance of the work.

Sullivan and Doan, by separate instruments in writing, assigned to the defendant Waldorf their said contracts so far as they related to the graveling of the roads, and Waldorf in such assignments agreed "to give a bond in the sum of \$5,000.00 * * * as security to them of the proper performances of the within contract conditions."

The consent of the county board to such assignments was given on May 21, 1917. In pursuance of the assignments, Waldorf furnished to Sullivan and Doan respectively the bonds required thereby, with the defendant surety company as surety. These bonds were similar in form, both being conditioned:

"Whereas, the principal and the obligee have entered into a written contract, hereinafter called the contract, for furnishing and hauling gravel and leveling same on a certain road in the township of New Haven, county of Shiawassee, and State of Michigan, dated the 19th day of February, 1917, a copy of which is attached hereto;

"Now, therefore, the condition of the foregoing obligation is such that if the principal shall indemnify the obligee for all loss that the obligee may sustain by reason of the principal's failure to comply with any of the terms of the contract, then this obligation shall be void; otherwise it shall remain in force."

It appears that Waldorf hired one William C. Sae-man to haul gravel for him and that the work he thus

did was not kept separate so far as the two jobs were concerned. On Waldorf's failure to pay for this work, Saeman sued him and made both Sullivan and Doan and the sureties in their lien bonds parties. Waldorf was not served, and the others did not defend. The defendant surety company was notified of the pendency of this suit by both Sullivan and Doan and requested to defend the same and thereby save them harmless on their bonds. Mr. Ruttle, a representative of the defendant company, came to Corunna and looked the matter up. He talked with both Sullivan and Doan about it, but declined to defend the suit. A judgment on default was rendered against all of the defendants for \$737.14 and costs.

Sullivan and Doan estimated their several liability on such judgment, Sullivan assuming \$271 and Doan \$466.14, and paid the same. Doan then assigned to Sullivan all right of action he might have, by reason of such payment, on the bond given by Waldorf to him and in which the defendant company was his surety, and Sullivan brought this suit against Waldorf and the surety company to recover the amount of the Saeman claim. Waldorf was not served. The declaration counts on the contract and bonds separately and as to the Doan claim alleges an assignment of his right of action to Sullivan. The plaintiff had verdict and judgment, and the defendant surety company appeals.

1. Do the bonds given by the defendant company as surety for Waldorf cover labor claims? The rights and liabilities of Waldorf accrued under the assignments made to him by Sullivan and Doan. These were annexed to the contracts made with the county board which, including the specifications annexed thereto and forming a part thereof, thus became a part of Waldorf's contract, and he became chargeable with the performance of every obligation assumed by Sullivan

and Doan thereunder, relative to the graveling of the roads. Waldorf thus had notice that the lien bonds had been given and that Sullivan and Doan were liable thereunder to pay for all labor performed whether hired by them or by himself. The bonds sued on were given to indemnify the obligees for all losses sustained by reason of Waldorf's failure to comply with any of the terms of his contract. As before stated, his obligation under his assignment must be held to include every obligation of Sullivan and Doan under their respective contracts. There seems no escape from the conclusion that as the obligees in the respective bonds suffered loss by reason of their liability to Saeman for the work done by him, the principal and surety must, under the conditions of the bonds, indemnify them for such loss.

2. There would seem to be no question but that plaintiff might join his right of action on the bond given him by Waldorf with that accruing to him under the assignment from Doan. Such right of action is clearly provided for in the judicature act of 1915, 3 Comp. Laws 1915, § 12309, and was doubtless permissible before that act was passed. *Randall v. Wayne Circuit Judge*, 96 Mich. 284. Defendant's counsel apparently so concedes, but he insists that, when so joined, the right to recover under each must have been as clearly proven as though separate suits had been brought therefor. There was proof offered which showed a liability under each bond. It is undisputed that a part of the gravel hauled by Saeman was put on the road which Sullivan was under contract to build and a part on that which Doan had contracted for. The amount due Saeman, and for which he recovered judgment, was not in dispute. There was evidence from which the jury could have determined this amount independent of the judgment. Had separate suits been brought, plaintiff would have been re-

quired to prove the amount due Saeman from Waldorf on the respective jobs. Waldorf owed the amount for which judgment was recovered in this case to Saeman, and the plaintiff and Doan under their bonds were liable to Saeman therefor. The defendant company in its undertakings agreed in effect to make good the default of Waldorf in failing to make payment thereof. The fact that the damages on account of Waldorf's default were not proven in separate items has in no way increased its liability.

If it be conceded that the admission of evidence of the damage sustained in a lump sum was error, how can it be said that it affirmatively appears that such error has resulted in a miscarriage of justice? This we must say in order to reverse the judgment rendered, under the provisions of the judicature act of 1915, 3 Comp. Laws 1915, § 13763.

3. It is claimed that Waldorf was overpaid on his contracts in violation of their terms and of the conditions in the bonds and that the surety is thereby released. The contracts made by Sullivan and Doan respectively provide that payment should be made every two weeks on estimates of the engineer when approved by the board and that 20 per cent. should be retained until the work was fully completed and accepted by the state highway commissioner. In defendant's bonds the obligees agreed to "retain such proportion as the contract specifies * * * but not less in any event than ten per cent.," until the contract was fully completed. The work was being performed by Waldorf under his assignments from Sullivan and Doan, assented to by the county board. He thus assumed their duties and liabilities and, in effect, became a party to the original contracts. The amounts he should be paid under the estimates was a matter between him and the county board. Mr. Bailey, the chairman of the board, and who, it appears, was also

acting as engineer, testified that he made written estimates but was unable to produce them. He further said:

"I did not at any time, according to these estimates, pay this man Waldorf more than eighty per cent. of the amount of any of the written estimates that I made."

He testified at considerable length as to the manner in which the estimates were made and the allowance for work done in uncovering the gravel in the pit. He also stated that Mr. Ruttle, a representative of the defendant company, was there several times examining the papers on file and "he claimed we were not paying Mr. Waldorf enough on our estimates, so he could pay his help."

Defendant's counsel submits a computation of the gravel put on by Waldorf on the respective jobs from estimates afterwards found by Bailey and by comparison with the amount paid him claims an overpayment after making the deduction provided for in the contract. Some of the estimates on which he relies were made the following spring and after the road had been used during the winter.

In view of the positive testimony of Mr. Bailey and the fact that, as stated by him, an allowance was made for uncovering the gravel in the pit, we do not feel so convinced of the correctness of counsel's conclusions as to justify us in setting aside the verdict of the jury on this question. The court instructed them:

"I charge you that if you should find that Arthur L. Waldorf received from the board of road commissioners more than 80% of the value of the completed work and materials furnished in place as the work progressed as estimated by the officer or engineer in charge, then and in such case your verdict would be no cause of action as to the Fidelity and Casualty Company of New York."

We are asked to strike from the files defendant's brief wherein counsel criticise the conduct of plaintiff's attorneys, charging that they advised Sullivan and Doan about their defending the Saeman suit. In the rural parts of the State, local attorneys are usually well known and it is not infrequent for parties when sued to call on and talk with the attorney for the plaintiff about the suit brought. This is apparently what happened, and of itself does not warrant a charge of unprofessional conduct against such attorneys. We have examined the record with care, and feel constrained to say that we find the criticism uncalled for.

The judgment is affirmed

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

BENJAMIN v. MCGRAW.

1. APPEAL AND ERROR—DIRECTED VERDICT.

On review of a directed verdict for defendant the Supreme Court will view the testimony in the light most favorable to plaintiff.

2. NEGLIGENCE—PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—CROSSING ACCIDENT—REASONABLE CARE.

There is no imperative rule of law requiring a pedestrian, when approaching a street crossing, to look both ways before stepping off the curb; reasonable care under the surrounding circumstances being all that is required.

3. SAME—AUTOMOBILES.

The driver of an automobile approaching a crossing on a

On the question of reciprocal duty of operator of automobile and pedestrian to use care, see notes in 3 L. R. A. (N. S.) 345; 20 L. R. A. (N. S.) 232; 38 L. R. A. (N. S.) 488; 42 L. R. A. (N. S.) 1179; 51 L. R. A. (N. S.) 992.

city street is required to exercise such reasonable care as the case requires.

4. SAME—EVIDENCE—QUESTION FOR JURY.

In an action for personal injuries to a pedestrian who attempted to cross a city street at a public crossing, where he turned back to avoid defendant's automobile and was struck by it after he regained the curb, questions of negligence and contributory negligence, *held*, for the jury.

Error to Wayne; Mandell (Henry A.), J. Submitted October 17, 1919. (Docket No. 79.) Decided December 22, 1919.

Case by DeWitt C. Benjamin against William E. McGraw for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Reversed.

Dohany & Dohany, for appellant.

William E. Tarsney, for appellee.

SHARPE, J. The plaintiff sued to recover damages for injuries sustained by him by being struck by an automobile, driven by defendant, at the intersection of Baldwin and Kercheval avenues in the city of Detroit, on the 27th day of March, 1917. At the conclusion of plaintiff's proofs, a motion was made by defendant's counsel for a directed verdict, which was denied. After both parties had rested, such motion was renewed and a verdict for defendant directed by the trial judge for the reason that the plaintiff was guilty of contributory negligence. A motion for a new trial was subsequently made by plaintiff, which was denied, and he now seeks a review of the action of the trial court by a writ of error.

The plaintiff, accompanied by one Clarence Jackson, while walking on the west side of Baldwin avenue, having reached the intersection above named,

started to cross Kercheval avenue from the south to the north side. The defendant was driving a car on the right side of Kercheval, toward the east. On direct examination, plaintiff testified:

"As we attempted to cross Kercheval, I stepped about two steps off the curb and glanced at the left and saw a red automobile coming, I should judge 60 or 70 feet away. It was coming east on the south side of Kercheval, approaching us.

"As I stepped down off the curb, I turned to the left to see if anything was coming and I saw the machine and I turned at once to get into the safety zone. I had stepped about four or five feet away from the southerly curb of Kercheval. I then advanced to the left, toward the west, and saw a machine coming and I turned as quickly as possible to regain the sidewalk. I stepped back to the curb, onto the grass. It was a crosswalk. I stepped to the south of the curb. I should judge I was two or three feet on the crosswalk or the curb when the automobile was slammed into my right side. I think possibly it was the bumper that struck me right here on the knee. * * * When I stepped off the southerly curb of Kercheval and saw it, I should judge it was going at the rate of 30 or 35 miles per hour. I immediately concluded to turn back and step upon the sidewalk. I did not stop and deliberate very long either. I could not say whether the automobile slackened its speed before it struck me. It went in the neighborhood of 100 to 150 feet after it struck me, before stopping. It stopped on Kercheval at least one-third of the way over from Seyburn. When it finally came to a stop it was headed west toward the direction from which it had been coming. There is a double track on Kercheval and the cars run east and west. When this automobile was going east just before the accident, it was between the south track and the south curb of Kercheval. That was where it was when I first saw it. After it stopped it was standing about in the middle of the street. In the middle of the street car tracks, headed westerly. I saw the automobile just before it hit me. The left wheel of the auto was below the curb. There was one wheel, as I can remember, that was on the curb

and the other, the hind wheel, was dragging right alongside the curb, the rear wheel of the right side was dragging right along by the side of the curb and the right front wheel was up on the curb and the two left wheels would be off from the curb. The curb is the division between the street and the grass plot, and the left wheel ran up over the curb or the right wheel. The right wheel ran up over the curb on the grass plot between the curb and the sidewalk. The left wheels were down in the street on the pavement. That is the position it was in when it hit me."

On cross-examination, he testified:

"Q. Just before you stepped off, just before you stepped off the curb or as you were coming to the curb did you look to the west?

"A. No.

"Q. You did?

"A. I don't think so.

"Q. You did not look to the west at all?

"A. Not sure whether I did or not. (Continuing.) I don't know whether Mr. Jackson did or not. We were busily engaged in conversation. We had got through talking about the house. I presume we were engaged in conversation.

"Q. You two gentlemen walked along on Baldwin avenue right across Kercheval?

"A. Yes, sir.

"Q. When you came to the curb line you just stepped down out into Kercheval avenue?

"A. Yes, sir.

"Q. Is that right?

"A. That is right.

"Q. You had no occasion to look to the west, your street car would not come from that direction?

"A. No, sir.

"Q. Your street car would come from the east?

"A. Yes, sir.

"Q. You had no occasion to look to the west as you stepped off the curb?

"A. Just as a matter of course.

"Q. Did you look?

"A. Yes, sir, that is what I did do.

"Q. What did you do?

"A. I saw a red car coming.

"Q. Where was the red car?

"A. In the street.

"Q. How far away from you?

"A. I presume it was—anything coming toward you it is hard to tell the distance of; it was just 60 to 70 feet. (Continuing.) It was about half way between the track and the curb. It kept the same position—it occupied the same position as any other vehicle generally occupies, coming in the same direction this was coming. There was just one in the machine.

"Q. How far had you gotten off the curb?

"A. About two paces, about five feet.

"Q. What did you do?

"A. Returned and went back to the sidewalk.

"Q. What did the automobile do?

"A. Jumped the curb and knocked me in the middle of Baldwin avenue.

"Q. Did you keep your eyes on the automobile as it approached you?

"A. I saw it as it was right there onto me.

"Q. As a matter of fact you did not see the machine until it was right on you, did you?

"A. It might have been pretty close to me when I saw it, it was coming pretty fast.

"Q. Your position—your observation of the automobile and being struck by the automobile was in the same instant?

"A. No, I knew the automobile was to strike me, it seemed impossible for me to move at that moment.

"Q. Seemed impossible to move?

"A. Yes, sir, coming right up on the curb—

"Q. You were out in the middle of the street when you saw the automobile?

"A. No, the street is 41 feet wide and I was about 5 feet out.

"Q. Isn't it true, taking your testimony, that from the curb line on Kercheval avenue to the first street car track that you come to as you go north is a distance of 13 feet?

"A. Yes, sir.

"Q. You had stepped off the curb and you had gone 5 feet of the 13?

"A. Yes, sir.

"Q. Pretty near in the center?

"A. Yes, sir.

"Q. That is the position you occupied when you first saw the automobile?

"A. Yes, sir.

"Q. What did you do?

"A. Turned around and went back onto the grass.

"Q. What next did the automobile do?

"A. Jumped the curb and hit me.

"Q. Where did it jump the curb?

"A. 30 to 35 feet back from the crossing.

"Q. Do you mean west of Baldwin avenue?

"A. West of Baldwin avenue.

"Q. How much of the car got over the curb?

"A. The front right wheel. * * *

"Q. Why didn't you continue across the street?

"A. Caution, safety first.

"Q. There was no vehicle coming?

"A. No.

"Q. No vehicle coming in the other direction, coming west?

"A. No. (Continuing.) I was only five feet into the 41 feet. Traffic going east in the direction in which this automobile was traveling would be on the south side of Kercheval avenue. That is where the automobile was. The south side of Kercheval avenue is paved. Thirteen feet in width. I was out and the automobile when I first saw it was 60 or 70 feet away, was in the usual line of travel of automobiles or other automobiles going east. I at that time was five feet out into the highway. There was no traffic west bound.

"Q. Why didn't you continue across the street?

"A. Caution. If it had been an ordinary vehicle we would have continued across, but we generally get away for fire apparatus."

Clarence Jackson, who was with plaintiff at the time, testified:

"As we approached Kercheval avenue we came up to the curb and stepped off about two paces, say 5 feet, at a glance I saw the machine coming and receded back to the sidewalk. It was a fire engine or

machine, coming from the west on the south side of Kercheval. When I saw this machine coming, at first glance, it was 50 or 60 feet away.

"I have driven and ridden in automobiles many times. I have owned an automobile at least twelve years. I am able to judge the speed at which an automobile goes. This automobile was approaching at 30 or 35 miles an hour, I should say 35 miles an hour. I instantly went back to the sidewalk, to the nearest point we had just left—the nearest point to get back to public safety. We went south on the southerly curb about three feet. That was on the west side of Baldwin avenue, the spot we had just left. The moment we had been—we had not had time to turn around before the machine hit us and then there—we had stepped to the sidewalk and missed the sidewalk and took one step further away, away from the edge of the curb onto the sidewalk, and we were just going to turn around when the machine hit us. We were going to face the same way the machine was coming. We had no particular reason only expected the machine to pass by to go on its way. The machine hit us right at that point. As near as I can tell it was the fender must have hit me. The right front fender. After I was struck I was knocked 45 feet."

We have quoted from the testimony of plaintiff and his witness at length. Under the familiar rule relative to directing a verdict on the ground of contributory negligence, we must view the testimony in the light most favorable to plaintiff. From this testimony the jury could have found that the defendant was driving the car at a speed of from 30 to 35 miles per hour, that he gave no notice of his approaching the crossing, that the car was distant 60 feet when plaintiff first saw it, that he was then about 5 feet from the curb, that it was a car used by the fire department of the city.

Since this case was disposed of in the circuit, this court has had occasion to consider the relative rights

and duties of drivers and pedestrians on the streets under a somewhat similar state of facts. In *Patterson v. Wagner*, 204 Mich. 593, the plaintiff was killed by having been run into by an automobile at the intersection of two streets in the city of Jackson. The deceased had stepped off the curb a distance of about 5 feet when struck by defendant's car. The defense of contributory negligence was interposed. Mr. Justice STEERE, who wrote the opinion, calls attention to the fundamental rule laid down in *Babbitt on Motor Vehicles* (2d Ed.), § 385, that:

"Motor vehicles must be driven slowly on approaching a crossing. The test seems to be whether the driver has control of the situation, whether he is so driving that he can stop if necessary soon enough to avoid an accident."

He further says on page 599, *et seq.*:

"Relative to the mutual rights and duties of those using the highway at such points it is said in *Babbitt on Motor Vehicles* (2d Ed.), § 1295:

"At crossings on city streets the right of passage is common to all and both pedestrians and drivers of motor vehicles are bound to exercise reasonable care for their own safety and the safety of others upon the street. The footman is not required as matter of law to look both ways and listen but only to exercise such reasonable care as the case requires. Both pedestrians and drivers are required to exercise that degree of care and prudence which the conditions demand. It is impossible to formulate any more precise definition of these relative rights and duties."

"Unlike street cars or railroad trains, which in their noisy progress are confined to the narrow line of their rail tracks, automobiles with practically equal capacity for speed can range the road in substantial silence. They can and do traverse the streets at much greater speed, with much less noise, than other highway vehicles in common use, and on the other hand can be more surely and easily controlled by those experienced in their use. The duty and responsibility of those driv-

ing them should be, and is, proportioned to the possibilities and dangers attending the use upon the public highways of such an instrumentality of travel and transportation. It is but a rational rule which emphasizes the driver's duty of special vigilance at crossing points on city streets where the right of passage is not only free and common to all, but in common and frequent use both by pedestrians and vehicles. While the duties of reasonable care for their own safety and that of others are imposed upon both pedestrian and driver, the driver's comparative personal safety in case of collision with a pedestrian is not to be overlooked in measuring his duty to exercise commensurate care for the safety of others."

The views expressed in this case seem to be in harmony with those of appellate courts in other jurisdictions. In *Baker v. Close*, 204 N. Y. 92 (97 N. E. 501, 38 L. R. A. [N. S.] 487), it is said:

"The rigorous rule applicable to steam railroad crossings is necessarily relaxed at the usual street crossings, and the footman is not required, as matter of law, to look both ways and listen; but only to exercise such reasonable care as the case requires, for he has the right to assume that a driver will also exercise due care and approach the crossing with his vehicle under proper control."

See, also, *Lynch v. Fisk Rubber Co.*, 209 Mass. 16 (95 N. E. 400).

There is no imperative rule of law requiring a pedestrian when approaching a street crossing to look both ways before stepping off the curb. He is only required to exercise such reasonable care as the surrounding circumstances require. In crowded centers where there is much traffic, the danger is greater and greater precaution must be taken to avoid collisions. The plaintiff at the time he was struck by the car was on the curb, a place which should have been to him one of safety. The defendant had no right to have his machine there. Whether he was justified in

so running it, in his effort to avoid injury to plaintiff, as claimed by him, was a question for the jury.

The plaintiff's injury may have been due to a mere accident, for which neither party was at fault. It may have been due to the negligence of the defendant. The negligence of the plaintiff himself may have been the cause of, or contributed to, his injury. These questions should have been submitted to the jury.

The judgment entered is reversed, and a new trial ordered with costs to appellant.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

PHILLIPS v. FARMERS' MUTUAL FIRE INSURANCE CO.
OF KALAMAZOO COUNTY.

1. INSURANCE—CHANGE OF TITLE—VOIDING POLICY—MUTUAL INSURANCE.

The risk assumed by a mutual fire insurance company on plaintiff's property was not terminated by a deed and assignment of a land contract of sale of the same by her to a broker for the purpose of securing a purchaser and with no intention of conveyance to him, although a clause in the policy provided that any change in the title of the property should terminate the risk.

2. SAME—DEEDS—DELIVERY—CHANGE OF TITLE—INTENT.

There being no intention of presently passing the title to the broker, there was no such delivery as conveyed a present interest in the property.

3. APPEAL AND ERROR—ESTOPPEL—CONSENT TO DIRECTED VERDICT.

Defendant is foreclosed from claiming in this court that

another issue should have been submitted to the jury, where, on the trial, it conceded that the only question for the jury was the one of plaintiff's damages.

Error to Kalamazoo; Weimer (George V.), J. Submitted October 14, 1919. (Docket No. 45.) Decided December 22, 1919.

Assumpsit by Mary A. Phillips against the Farmers' Mutual Fire Insurance Company of Kalamazoo County on a policy of insurance. Judgment for plaintiff. Defendant brings error. Affirmed.

E. M. Irish, for appellant.

Charles L. Dibble, for appellee.

SHARPE, J. The following statement of facts is taken from the brief of counsel for appellant:

"The defendant is a mutual fire insurance company. On the 17th day of January, 1916, the plaintiff took out a policy on some buildings in the amount of twenty-five hundred (\$2,500.00) dollars. On the second of February, 1917, the buildings were burned. The loss was total.

"Defendant refused to pay the loss on the ground that plaintiff had violated the conditions of the policy by change of the title without consent of the company.

"The conditions of the policy contained this clause:

" 'If the title to said property shall be in any way changed, or a failure of the assured to show ownership or interest, * * * the risk hereon shall cease and terminate and the policy be null and void.'

"The by-laws were a part of the policy, and by-law 11 repeated the above condition.

"On November 22d, 1916, the plaintiff executed and delivered to one Stephen Chilson, a Michigan warranty deed of the property in question, the warranty being subject to a mortgage, and took a promissory note from him for \$2,500.00.

"The deed was not placed on record.

"This deed was absolute on its face. The evidence

in the record consists of a detail of the circumstances under which it was given."

It also appears that plaintiff had theretofore entered into a land contract with one Lanning for the sale of the property to him. This contract was also assigned by her to Chilson. It is the claim of the defendant that the execution and delivery of the deed to Chilson was such a change of title, within the language of the policy and by-law, as rendered the policy void, and that a verdict should have been directed in its favor. This claim is denied by the plaintiff, who claims the deed was executed and delivered under such circumstances as show that the parties did not intend it to operate as a conveyance. Plaintiff also claims that, if defendant's contention stated above should be sustained, it then devolved on defendant to show that it had been injured by such breach, under section 9481, 2 Comp. Laws 1915, which reads as follows:

"(9481) SECTION 1. No policy of fire insurance shall hereafter be declared void by the insurer for the breach of any condition of the policy if the insurer has not been injured by such breach, or where a loss has not occurred during such breach, and by reason of such breach of condition."

To this defendant replies that this statute was repealed by Act No. 256, Public Acts 1917.

At the close of the proofs, both parties moved for a directed verdict. It seems to have been conceded that there was no disputed question of fact to submit to the jury except the question of plaintiff's damages. This question the court submitted, instructing the jury that there was no change of title such as would affect the policy. The defendant afterwards, and before judgment was entered on the verdict, moved for a judgment for defendant *non obstante veredicto*, the right to do so having apparently been reserved under the provisions of Act No. 217, Public Acts 1915 (3

Comp. Laws 1915, § 14568 *et seq.*). In denying the motion, the trial judge said:

"If the court is to determine the intent with which the deed was executed and delivered, then it would seem possible to reach but one result. In my opinion under the undisputed testimony, it was clearly not the intention of either the plaintiff or Chilson to vest the latter with any right, title, or interest in or to the property or any ownership of the same. Certainly Mrs. Phillips had no thought of relinquishing proprietorship over the property to Chilson. She was dealing with him as a real estate broker. He was acting as her agent in the transaction for the purpose of finding a purchaser, and that alone. She may have been, and probably was, improperly induced to execute and deliver a writing in such form that in the hands of an unscrupulous agent it might have caused her serious embarrassment, but that could in no way affect her intention in the matter. Whatever suspicion may have been aroused afterwards regarding Chilson's conduct as shown by the bill in chancery, the record in this case fails to disclose that he entertained any other or different intention in the transaction than she. Everything in the testimony of plaintiff, Chilson, and the attorney, Goembel, who drafted the deed, shows beyond doubt that it was the contemplation of the parties that Chilson was to act as the agent of plaintiff in handling, looking after, and negotiating a sale of her property.

"It is my conclusion, therefore, that the execution and delivery of the writing, in form of warranty deed, under the particular circumstances shown, did not constitute a transfer of the title within the meaning of the policy."

Counsel for defendant relies on the case of *Western Massachusetts Ins. Co. v. Riker*, 10 Mich. 279, and kindred cases, in which it is held that a deed absolute on its face, though given as a security, avoids the policy. It also holds that a conveyance intended to create a secret trust in the grantee for the use of the grantor creates a change of title within the language of the policy.

The distinction between the *Riker Case* and the one at bar lies in the fact that, as found by the trial judge, there was no present intention on the part of the parties to pass any title to Chilson. While it was in his power, in fraud of his duty to plaintiff and her rights, to have conveyed this property independent of his agreement with her that it should only be done if he secured a purchaser thereof, such power on his part, not having been exercised, should not be held to have created such an interest in the property in him as in any way changed the title thereto. The arrangement was in effect the same as though plaintiff had given Chilson a power of attorney to convey the property for her when a purchaser was secured.

We are also of the opinion that the trial judge might well have found that there was no such delivery of the deed from plaintiff to Chilson as would pass title to him. The plaintiff testified that at the time the deed was prepared she said to Mr. Goembel, the attorney who drew it, "I am giving Mr. Chilson a deed of this property so he can sell it for me." Mr. Goembel testified that at that time the plaintiff said to him, "Well, Mr. Chilson is going to sell this property." Chilson testified: "The deed was simply held by me. The deed wasn't mine."

As was said by Mr. Justice OSTRANDER in *Pollock v. McCarty*, 198 Mich. 66:

"The test is whether it can be said that delivery of the deed was such as to convey a present interest in the land."

Many Michigan cases are cited by him in its support, to which reference is here made. Applying this test, in view of the finding of the trial judge, in which we concur, that—

"It was clearly not the intention of either the plaintiff or Chilson to vest the latter with any right, title,

or interest in or to the property or any ownership of the same,"

—it must be held that there was no such delivery of the deed to Chilson as conveyed "a present interest in the land."

"The whole object of a delivery is to indicate an intent upon the part of the grantor to give effect to the instrument." *Thatcher v. St. Andrew's Church*, 37 Mich. 264, 269.

Counsel for defendant now insists that the intent with which the deed was executed and delivered should have been submitted to the jury. In view of the concession made by him at the time the motions to direct were argued, we think he is foreclosed from raising this question.

The conclusion reached renders it unnecessary to pass upon the effect of the repealing statute.

The judgment will stand affirmed.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

JONESCU v. ORLICH.

1. EVIDENCE—ADMISSIONS OF AGENT—ADMISSIBILITY.

The declarations of an agent as to a past transaction are inadmissible to bind the principal.

2. SAME—MASTER AND SERVANT—ADMISSIONS OF FOREMAN AFTER THE FACT.

In an action against the employer for the death of plaintiff's decedent caused by a fall through a skylight while

he was at work on a roof, admissions on the way to the hospital by defendant's brother, who was in charge of the work as foreman, that he forgot to tell decedent about the skylight, which was covered with snow, held, inadmissible as after the fact.

3. SAME—WITNESSES—STATUTES—ADVERSE PARTY.

Under 3 Comp. Laws 1915, § 12554, on plaintiff's theory that defendant's brother was his agent, the brother might have been called and questioned as to his knowledge of the existence of the skylight and that it was concealed by snow.

4. SAME—ADVERSE PARTY—PRIVILEGE—WAIVER—FURTHER EXAMINATION—SCOPE—MASTER AND SERVANT.

While the representative of the deceased waived the privilege of the statute (3 Comp. Laws 1915, § 12553) prohibiting a party adverse in interest from testifying as to facts equally within the knowledge of the deceased, and compelled defendant to testify under 3 Comp. Laws 1915, § 12554, as to the contract of hiring, the door she thus opened to a further examination of defendant was confined to said contract, and a question by his counsel as to whether he called deceased's attention to the skylight, being no part of the contract of employment, was inadmissible.

Error to Wayne; Murphy (Alfred J.), J. Submitted October 28, 1919. (Docket No. 20.) Decided December 22, 1919.

Case by Letitia Jonescu, administratrix of the estate of Laker Jonescu, deceased, against John Orlich for the negligent killing of plaintiff's decedent. Judgment for plaintiff. Defendant brings error. Reversed.

Duncan C. Beath, for appellant.

Benjamin & Betzoldt, for appellee.

SHARPE, J. Plaintiff's intestate, Laker Jonescu, met his death on January 29, 1917, by falling through a skylight on the roof of defendant's building at 1192 Russell street, in the city of Detroit. He was a car-

penter by trade, and had been engaged by defendant to make repairs on the premises. It is the claim of the plaintiff that the deceased was employed by the defendant as a day laborer. That on the day in question defendant's brother Andrew, who, plaintiff claims, had charge of the work for defendant, asked the deceased to go with him to a platform which extended in the rear of the second story of the front part of said building, and around which defendant desired a railing constructed, to measure up the material needed therefor. That the roof of the back part of the first story of the building was but a few inches below the platform and was covered with several inches of snow, entirely concealing a glass skylight built in and forming a part of such roof. That, owing to a door having been left standing on said platform, it was necessary for deceased to step off therefrom, and on the roof, to make such measurements. That, as he did so, he stepped on the concealed skylight and fell through to the floor below, sustaining injuries from which he died a few hours afterwards.

The negligence of defendant is said to be:

1. In not furnishing deceased with a safe place to work.
2. In not warning him of the existence and location of the skylight, concealed as it was with the covering of snow.

The defendant claims that the deceased was an independent contractor in the work he was doing and that the danger from stepping on the skylight was apparent to him. He also denies that Andrew had charge of the work for him.

The plaintiff had verdict for \$6,000, on which judgment was duly entered. The defendant moved for a new trial, which was denied, and he now appeals, alleging many errors in the trial as well as in the denial of his motion for a new trial.

The first assignment of error relates to permitting the witness, John Korkes, who, with defendant's brother Andrew, was taking the deceased to the hospital, to state what Andrew then said to him about the accident. After some preliminary questions, Korkes was asked:

"Q. What else did Andrew say to you?

"A. Andrew was asked, 'What is the matter that you did not tell him about the skylight up there?' He said, 'By God, I forgot about it.' He told me there was snow there, three inches of snow—"

This was received under objection, and a motion was afterwards made to strike it out, which was denied. It is conceded that the defendant was not then present. The defendant insists that even if Andrew had charge of the work for him and was his agent, the declarations of an agent after the fact are not binding on the principal. The plaintiff claims that it was competent as tending to show that Andrew, as such agent, had knowledge of the existence of the skylight and was thus under obligation to the deceased to warn him of the hidden danger. The claim of the plaintiff is thus stated in his brief:

"We contend that this testimony was competent for one purpose to show that Andrew Orlich, the superintendent of the job, and the vice-principal of defendant, who ordered and accompanied Jonescu upstairs to measure the porch for the railing, knew at the time of the existence of this skylight, and that it was hidden and covered by snow. This testimony was admitted by the court for that purpose only. In order for plaintiff to recover it was necessary to show as one of the elements of her case, that Andrew Orlich, the *alter ego* of defendant, knew at the time of the existence of this skylight, and that it was covered with snow, thereby preventing Jonescu from seeing or appreciating the dangers. Therefore, the cases cited by appellant on *res gestæ* have no application."

Our own decisions have settled the law on this question adversely to the claim of the plaintiff. In *Andrews v. Tamarack Mining Co.*, 114 Mich. 375, the court admitted, over defendant's objection, the testimony given by the underground captain of defendant's mine (having charge of all underground work) at the coroner's inquest held over the body of plaintiff's intestate, to the effect that he knew the mine was in a dangerous condition. It was offered, as was the testimony here, for the purpose of showing knowledge by him of the conditions surrounding the deceased while at the work he was instructed to do. This court, speaking by Mr. Chief Justice LONG, said:

"The court was in error in permitting this deposition to be read. It was not offered for the purpose of impeaching Captain Maslin, but for the purpose of proving a substantive fact; that is, that Maslin knew the mine was in a dangerous condition when he ordered the men in there. It is conceded that it was no part of the *res gestæ*. It has many times been held by this court that the declarations of an agent as to a past transaction are inadmissible to bind the principal. *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440; *Mabley v. Kittleberger*, 37 Mich. 360; *Patterson v. Railway Co.*, 54 Mich. 91; *Stebbins v. Township of Keene*, 55 Mich. 552; *Wormsdorf v. Railway Co.*, 75 Mich. 472 (13 Am. St. Rep. 453). It is true that, where the acts of the agent will bind the principal, then his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting a part of the *res gestæ*.

"But counsel for plaintiff contend that Captain Maslin was the *alter ego* of defendant, and that his agency continued at the time his testimony was given before the coroner; therefore, whatever Maslin said in reference to the occurrence at the mine would be binding upon the defendant, though said long after the occurrence. If he can be said to be the *alter ego*, he was not clothed with authority to make admissions."

See, also, *Beunk v. Valley City Desk Co.*, 128 Mich. 562; *Dompier v. Lewis*, 131 Mich. 144.

The reason for this rule is well exemplified in this case. In an affidavit, filed by defendant in support of his motion for a new trial, one Draga Popov deposed that she was looking out of the window which overlooked the platform in question when Andrew and the deceased were on it; that they engaged in a scuffle, and deceased was thrown or fell over on the skylight. If this be true, it would account for Andrew's making such a statement, in answer to the question of Korkes, as would place the liability for the injury and death of deceased on some one other than himself.

On plaintiff's theory that Andrew was in charge of the work as agent of the defendant, he might have been called as a witness under the statute (3 Comp. Laws 1915, § 12554) and questioned as to his knowledge of the existence of the skylight and the fact that it was concealed by the snow. That defendant was greatly prejudiced by the answer given is apparent. By it the plaintiff got before the jury an admission by the *alter ego* of the defendant, and therefore, under the court's instruction, binding on him, of the fact that he knew that the skylight was concealed, that it was dangerous, and that he neglected a duty in not advising deceased concerning it. For this error, the case must be reversed.

In view of a new trial, the other errors claimed by defendant, and which may again arise, will be considered. The plaintiff called the defendant for cross-examination under the statute above referred to, and questioned him at considerable length as to whether the deceased was employed by him by the day or was doing the work under a contract. On examination of defendant by his own counsel, he was asked: "Q. In your talk with him when he was upstairs, did you or

did you not call his attention to the skylight?" An objection by plaintiff's counsel was sustained, the trial judge holding that the question was within the prohibition of the statute prohibiting a party adverse in interest from testifying to facts equally within the knowledge of the deceased. While this statute was designed to protect estates, the plaintiff, as representative of the deceased, was privileged to call the defendant and compel him to testify, and by thus doing she opened the door to a further examination by defendant's own counsel as to all matters relative to which he had been interrogated. *Fox v. Barrett's Estate*, 117 Mich. 162. Counsel for defendant concedes that he was thus confined in his examination, but insists that the question asked related to the contract of hiring. It does not appear that any work was to be done by plaintiff's decedent on or around the skylight. There is some testimony that the purpose of erecting the railing was to keep boys who might be on the platform from interfering with the skylight. But it was not necessary for defendant to call plaintiff's attention to it in directing him relative to the work that he was to do in building the railing, except to warn him of the danger, and this would be no part of the contract of employment. We find no error in this ruling.

Assignments 8, 9 and 10 allege error in the charge of the court in submitting to the jury the question as to whether or not deceased was an independent contractor. The concession made by defendant's counsel when the case was presented in this court, that there was evidence tending to support the plaintiff's claim which entitled it to be submitted to the jury, obviates any discussion of this question. The language complained of as to the preponderance of the evidence was unfortunate as it seemed to cast the burden on defendant of showing that the deceased

was an independent contractor. That the court did not intend to so instruct the jury is apparent from the charge taken as a whole.

For the reason stated, the verdict and judgment will be set aside, with costs to defendant, and a new trial granted.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

ZANLEY v. HYDE.

1. LIBEL AND SLANDER—LETTER ACCUSING CRIME—PUBLICATION.

The writing and sending of an unsigned letter by defendant to plaintiff, a boy about 15 years of age, accusing him of larceny, was no such publication as would support an action for libel, although the letter was received, opened, and read by plaintiff's mother.

2. SAME—PRIVILEGED COMMUNICATION, WHAT CONSTITUTES.

Where a party makes a communication and such communication is prompted by a duty owed either to the public or to a third party, or the communication is one in which the party has an interest and it is made to another having a corresponding interest, the communication is privileged if made in good faith and without actual malice.

3. SAME—LETTER TO FATHER OF ACCUSED—DISCHARGE OF MORAL DUTY—QUALIFIEDLY PRIVILEGED.

Where defendant believed that a boy related to him had taken his children's banks and money and wrote to him to return the same, but, receiving no reply, wrote the facts to the boy's father, such communication was qualifiedly privileged, being written in the discharge of a moral duty.¹

¹The question of privilege of communications to relatives of person defamed, is discussed in a note in L. R. A. 1915A, 572.

4. SAME—PRIVILEGE—WHAT DETERMINES.

It is the occasion, and not the language used, which determines whether a communication is qualifiedly privileged.

5. SAME—LIBELOUS PER SE—MALICE PRESUMED.

A letter to a father imputing the crime of larceny to his son is libelous *per se*, and malice will be presumed.

6. SAME—PRESUMPTION REBUTTED WHERE COMMUNICATION PRIVILEGED—BURDEN OF PROOF.

But where it appeared that such communication was privileged, the presumption of malice was rebutted, and the burden of proving actual malice or a lack of good faith on the part of defendant devolved on plaintiff.¹

7. SAME—EVIDENCE—INTRINSIC—EXTRINSIC—PROOF.

The evidence to prove same may be either intrinsic, being shown by the nature of the language used and the manner and extent of its publication, or extrinsic, consisting of facts which show previous ill-feeling or personal hostility, or that the letter was written without the defendant's having made reasonable inquiry and investigation and not in good faith.

8. SAME—ABSENCE OF MALICE—DIRECTED VERDICT.

Where the record shows that plaintiff's counsel, at the close of the proofs, and also on motion for new-trial, conceded that there was no evidence of malice, either in law or in fact, in the writing of the letter sued on, the trial judge properly directed a verdict for defendant.

Error to St. Clair; Tappan (Harvey), J. Submitted October 7, 1919. (Docket No. 5.) Decided December 22, 1919.

Case by Floyd Zanley, an infant, by his next friend, against John Hyde for libel. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

McIntyre & Robinson, for appellant.

Walsh & Walsh, for appellee.

¹As to whether malice, which will preclude qualified privilege, be inferred from publication alone, see note in 12 L. R. A. (N. S.) 90.

208—Mich.—7.

SHARPE, J. The action is for libel. The defendant had judgment on a directed verdict, and plaintiff appeals. The plaintiff, a boy 15 years of age, residing with his parents in the city of Detroit, was taken by his mother to Yale, Michigan, where she obtained employment for him for the vacation period in 1918 with a farmer named Palmer. The defendant, whose wife is a cousin of plaintiff's mother, lived on a farm near by. Plaintiff frequently visited at defendant's home while working at Palmer's. After a few weeks, Palmer had no further need of plaintiff's services and defendant, at plaintiff's request, consented to plaintiff's staying at his home and agreed to pay him what the service rendered was worth. He remained there from Saturday until the following Friday. The day after plaintiff left, the defendant and his wife missed two small metal banks, in which their children kept their savings. Defendant testified that these banks and where they were kept was talked about in plaintiff's presence on the Sunday he was there and while in their automobile and on their way to a picnic. Defendant's wife testified:

"I remember this trip on Sunday to the lake. My husband and my family and myself and Floyd in the machine. We were at church first and I got lunch ready and we went after that, we took our lunch with us. Floyd was sitting in the front seat with my husband and one of our little boys. And I was in the back seat and I heard my husband say, 'Boys, how about your banks, are they all right and safe?' and one of the little boys said, 'I know they are all right because I put them in the drawer of the kitchen cabinet away back in the drawer of the kitchen cabinet'; he put them there that morning, so he said he knew they were safe, something like that. I had seen the banks in there that morning because I put a dime in one of them for one of the boys. It was so full I could hardly get the one dime in. They were round like a dollar, I don't believe they could be larger than

a silver dollar, and a picture of the Capac Savings Bank on the outside."

They both testify that the banks were missed on the following Saturday, the day after plaintiff left. On August 9, 1918, a few days later, plaintiff's mother received, opened and read the following letter, addressed to plaintiff:

"FLOYD ZANLEY:

"I want you to return that money and things you took from here; if you don't send it back in five days I will go down and take the sheriff and detective from this county. I would do it now only for your mother and father; now if you send it back at once I will not tell your mother or father or any one else, but if you don't, you will get the punishment and I surely will not spare you. I will not sign my name to this so if your mother should get it, she won't know who you took it from, but you know and you return those things with every cent and register them in five days at the latest, or you will see me."

This letter was written by defendant's wife and, as they both testify, without his knowledge or authority. No answer having been received thereto, defendant's wife wrote plaintiff's father the following letter:

"CAPAC, MICHIGAN.

"YALE, MICH., Aug. 17th, 1918.

"Dear Mr. Zanley:

"I wrote to your son, Floyd, about some money that we have proof that he took from here, but he has failed as yet to return it. I told him I would keep it quiet and not tell any one about it if he returned it, but as yet has failed; out of respect for you and your family, I did not make any arrest and thought I would write to you first to see if he told you. From what I have always heard about you, I know you would not want one of your boys to take a thing that didn't belong to them, so if you will have him send it back, I will not have any more trouble about it. I have been busy or would have gone to the city today, but will wait until I hear from you.

"We used Floyd good for the short while he was here; took him to church with us and to the lake, in fact, any place he went which only the last few days he was here and gave him \$2 besides. Now, I will want to hear from you.

"I am, respectfully,

"JOHN HYDE,
"Yale, Michigan."

No answer was received to this letter, but on August 22, 1918, plaintiff's attorney wrote defendant as follows:

"MR. JOHN HYDE,

"Yale, Michigan.

"*Dear Sir:*

"Mr. Floyd Zanley and Mr. Charles Zanley have received letters written by yourself, in which you accuse Floyd Zanley of being a thief. At this time, we absolutely deny such charges and demand that you write a letter of apology to Floyd Zanley and to Charles Zanley by return mail. If this advice is not followed, we shall take legal steps to collect for the damages which you have caused this young man by this most cruel libel."

No reply was made by defendant and a few days after plaintiff's mother and the attorney went to defendant's home near Yale to see him. The parties differ as to what there occurred, but it is apparent that defendant insisted that plaintiff had taken the money. While it appears that the letters, received by the mother and father of plaintiff, were written and sent by defendant's wife without his knowledge or assent, they were considered on the trial as though defendant had himself written and mailed them and we so treat them here.

At the close of the proofs, the trial judge directed a verdict for defendant, holding that there was no publication of the letter to plaintiff and that the letter to plaintiff's father was a privileged communication, written in good faith and under an honest belief that

the facts stated therein were true. In the discussion which preceded this action on the part of the court, the record shows that plaintiff's counsel said:

"I agree with the court that I have been unable to produce any evidence of malice either in law or in fact."

He, however, insisted that the letter was not a privileged communication. A motion for a new trial was subsequently made. In denying it, the trial judge said:

"Upon the motion for a directed verdict at the close of the trial, Mr. McIntyre, counsel for plaintiff, in open court, conceded the fact that plaintiff had failed to establish proofs of express malice or malice in fact and claimed that notwithstanding this lack of proof, the question of the *bona fides* of the defendant was still a question of fact for the jury to pass upon. This concession is a matter of record in the case. Again, upon the argument of the present motion, he makes the same concession and claim."

It seems clear that there was no such publication of the letter sent to plaintiff as would justify the action.

Should the question of defendant's liability on account of the letter written to plaintiff's father have been submitted to the jury? The general rule is stated in 25 Cyc. p. 385:

"Where a party makes a communication and such communication is prompted by a duty owed either to the public or to a third party, or the communication is one in which the party has an interest and it is made to another having a corresponding interest, the communication is privileged if made in good faith and without actual malice."

A distinction, as to such communications, is drawn between absolute and qualified privilege. This is carefully pointed out in *Bacon v. Railroad Co.*, 66 Mich. 166. We content ourselves with a reference to it. De-

fendant's claim is one of qualified privilege. As to this, it is said in the *Bacon Case*, just referred to:

"It extends to all communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty. And the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation."

Many cases from this and other courts are cited.

If the defendant believed that the plaintiff had taken the banks and the money therein contained, on his failure to get a reply from plaintiff a moral duty certainly rested on him to communicate the facts to plaintiff's father. This seems particularly true in view of the relationship existing between the families. It is the occasion, and not the language used, which determines the question.

Was there any evidence of malice or a lack of good faith on the part of the defendant in writing the letter to plaintiff's father? The language employed by the defendant imputed the crime of larceny to the plaintiff. It was therefore libelous *per se*, and it follows that malice is to be presumed therefrom. But when it appeared that the communication was privileged, this inference was rebutted and the duty devolved on plaintiff to assume the burden of proving actual malice or a lack of good faith on the part of defendant. The evidence to prove same may be either intrinsic, being shown by the nature of the language used and the manner and extent of its publication, or extrinsic, consisting of facts which show previous ill-feeling or personal hostility, or that the letter was written without the defendant's having made reasonable inquiry and investigation and not in good faith.

The purpose of defendant's wife in writing these letters is apparent. She wanted the children's money

returned. She apparently had no desire to in any way injure plaintiff. She gave him an opportunity to return the money before writing his father about it. While positive in the statement that he had taken it, she says nothing that would indicate she felt any ill-will towards plaintiff.

We cannot but conclude that there is nothing in the language employed which in itself can be said to rebut the inference derived from the privileged nature of the communication. Nor, as we understand plaintiff's brief, does he so contend.

What are the extrinsic facts? The plaintiff was a welcome visitor at defendant's home while employed at Palmer's. He accepted the amount paid him by defendant for the services rendered him and expressed himself as satisfied with it. He left voluntarily. No unkind word was spoken to him while there. There is nothing to show anything but a kindly feeling towards him on the part of the defendant until he found that the banks and the money in them were missing. Defendant claims that he then recalled the conversation in the automobile relative to the banks and where they were kept. One of his children told him that he saw plaintiff searching in the cupboard where the banks were hidden and, on being asked what he was looking for, answered, "A cup." The plaintiff had left, as defendant thought, somewhat hurriedly, it having been his understanding that plaintiff would stay until about September 1, when school opened.

The following language of Erle, C. J., in *Jackson v. Hopperton*, 16 C. B. (N. S.) 111 E. C. L. 829, is quoted approvingly in the *Bacon Case*:

"A plaintiff does not sustain the burden of proof which is cast upon him by merely giving evidence which is equally consistent with either view of the matter in issue. When the presumption of malice is neutralized by the circumstances attending the utter-

ance of the slander or the publication of the libel, the plaintiff must give further evidence of actual or express malice in order to maintain his action."

The rule of determination is thus stated in Newell, Slander and Libel (3d Ed.), § 396:

"When the matter complained of is privileged the burden of proving malice lies on the plaintiff; the defendant cannot be called on to prove he did not act maliciously till some evidence of malice, more than a mere scintilla, has been adduced by the plaintiff."

See, also, *Livingston v. Bradford*, 115 Mich. 140.

After a careful consideration of the entire record, we feel constrained to say that the verdict for defendant was properly directed. The judgment is therefore affirmed.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

SMITH v. BYRNE.

1. DEEDS—COVENANTS—RESTRICTIONS—GARAGE—INJUNCTION.

The erection of a garage for rental purposes on a lot in a residential district restricted to a "single private residence and the necessary outbuildings" is in violation of such restriction, and was properly enjoined by the court below.

2. SAME—INTENTION—ESTOPPEL—PREPONDERANCE OF EVIDENCE.

The finding of the court below that defendants' contention that plaintiffs were aware of defendants' purpose in erecting said garage building was not supported by a preponderance of the evidence, held, justified by the record.

Authorities passing on the question as to whether garage or stable as within restrictive covenants in conveyance of real estate are collated in a note in 34 L. R. A. (N. S.) 730.

Appeal from Wayne; Hosmer (George S.), J. Submitted October 21, 1919. (Docket No. 116.) Decided December 22, 1919.

Bill by Albert E. Smith and others against Dennis Byrne and others to enjoin the violation of building restrictions. From a decree for plaintiffs, defendants appeal. Affirmed.

Guy A. Miller, for plaintiffs.

Merriam, Yerkes & Simons for defendants.

SHARPE, J. The decree appealed from reads as follows:

"The above entitled cause having come on to be heard in open court, on pleadings and proofs, the testimony on behalf of plaintiffs and defendants having been offered in open court, and having been duly considered, counsel for plaintiffs and defendants having been heard, and it appearing to the court:

"1. That complainants Albert E. Smith and Josephine Smith, his wife, are seized and possessed of a legal estate in lot 101, Voigt Park subdivision of E. W. Voigt's subdivision of Voigt Park Farm, the same being a part of quarter section 36, 10,000 acre tract, according to a plat recorded in liber 22 of plats, page 94, in the Wayne county registry of deeds; that complainants Joseph W. Dykstra and Laura A. Dykstra are the owners of lot 100 of said subdivision; that defendants Dennis Byrne, Alice Byrne, E. L. White and Mrs. White are the owners of the legal title to, and of a legal estate in lot 102 of said subdivision.

"2. That the lots within said subdivision, and located on the north and south sides of Calvert avenue, in the city of Detroit, and between Second and Third avenues, within which limits said lots 100, 101 and 102 are located, are subject to a uniform building restriction which, in part, contains the following words: 'Nothing but a single private residence and the necessary outbuildings shall be erected on any one lot.' Such building restrictions are binding and valid, and

in full force and effect as between plaintiffs and defendants in the above entitled cause.

"3. That said defendant Dennis Byrne, on or about the 4th day of April, 1917, entered into a contract in writing with one Shepherd, said Shepherd being the owner of a flat building located upon the next street to the south of Calvert avenue, wherein it was agreed, among other things, that said Shepherd was to advance certain sums of money for the construction of a garage building or buildings upon said lot 102; that said Byrne was to construct such building or buildings, and, when constructed, said agreement provided for the leasing to said Shepherd of said building or buildings; that said Shepherd was to pay a rental of five dollars (\$5.00) per month for each car which said buildings were capable of accommodating; and that the purpose of said agreement was that said Shepherd might sublet space in said building or buildings to the tenants in his apartment building for their use in the storage of their automobiles.

"4. That at the time of the making of said agreement, there was upon the southeast corner of lot 102 a garage building sufficient in size to accommodate two automobiles; that after the making of said agreement, said defendants proceeded with the construction of an additional garage building upon the southwest corner of said lot 102, and the construction of an addition to the original garage building, and that the purpose of such new construction was to carry out the terms of said agreement with said Shepherd; that said buildings, when completed, were and are capable of accommodating five automobiles.

"5. That upon the completion of said buildings, said Shepherd went into possession thereof, under the terms of said agreement, paid rent thereunder, and is now in possession thereof and paying rent therefor.

"6. That subsequent to the erection of said buildings, said defendants White became purchasers under land contract from said Byrne of said lot 102, and are now securing the benefit of the rental received from said buildings by way of credit upon the amount owing by them under the terms of said land contract to said defendants Byrne.

"7. That the construction and occupation of said

buildings constituted a violation of the terms of the building restrictions, binding upon the owners and occupants of said lot 102, and running in favor of plaintiffs in the above entitled cause.

"8. It further appearing that the plaintiffs are entitled to the relief prayed for in their bill of complaint:

"It is hereby ordered, adjudged and decreed that said defendants, Dennis Byrne, Alice Byrne, E. L. White and Mrs. White be permanently enjoined and restrained from renting to others space in said garage buildings on said lot 102, Voigt Park subdivision of E. W. Voigt's subdivision of Voigt Park Farm, the same being a part of quarter section 36, 10,000 acre tract, according to a plat recorded in liber 22 of plats, page 94, in the Wayne county registry of deeds; and from using said buildings in any manner whatsoever for hire, and from using said buildings in any manner whatsoever in the prosecution of any business enterprise whatsoever;

"It is further ordered, adjudged and decreed that said defendants, Dennis Byrne, Alice Byrne, E. L. White and Mrs. E. L. White, within a space of four months from the service upon them, or upon the firm of Wilkinson, Routier & Hinkley, their attorneys in the above entitled cause, of a certified copy of this decree, remove from said lot 102 in said subdivision all of said garage buildings constructed and maintained thereon by said defendants, except such as are sufficient to reasonably accommodate two automobiles, and are fairly equivalent to the garage building located thereon prior to the fourth day of April, A. D. 1917.

"It is further ordered, adjudged and decreed that said defendants, Dennis Byrne, Alice Byrne, E. L. White and Mrs. E. L. White, be permanently enjoined from erecting in the future, any buildings upon said lot, except such as are reasonably necessary as properly appurtenant to the single dwelling house located thereon."

The defendants, who appeal therefrom, apparently find no fault with the facts as found therein. They urge, however, that the proofs submitted establish the following additional facts:

(1) That, when the defendant Byrne bought lot 102 in 1916, the smaller garage building stood thereon and that he rented the space therein for storing automobiles without objection from any one.

(2) That such action on his part was in accordance with the practice of many other owners of residences in the same block.

(3) That the plaintiffs were aware of his intention to rent the space in the larger building and raised no objection thereto until its completion.

The first two of these are immaterial to the issue here presented. The facts stated in no way estop the defendants from asserting their rights under the restrictive clause in the deeds. As to the third, there is a sharp conflict in the proofs. After a careful reading of the testimony, we feel constrained to hold, as did the trial judge, that it is not supported by a preponderance of the evidence.

The defendants claim that no violation of the restriction, if it be given a reasonable construction, is shown, and that, in any event, the relief granted in the decree was not justified. The language employed in the restriction is in no way uncertain or ambiguous. It reads:

"Nothing but a single private residence and the necessary outbuildings shall be erected thereon."

Its purpose is apparent. It was intended to preserve the territory for a residential district, for a place for dwelling houses and the outbuildings necessary for the enjoyment of their occupants. In other words, only such buildings additional to the residence can be constructed as are ordinarily used and occupied as aids to the use of the dwelling house. Clearly, a garage for rental purposes is not so needed.

Defendants insist that they should not be required to remove the buildings as provided for in the decree and that the only relief which should be granted, in

any event, is to enjoin the use for a purpose inconsistent with the restriction. There is nothing in the record which even suggests that the building might be used for any other purpose. It should not be permitted to remain on the lot, where, to some extent, at least, it restricts plaintiffs' view unless it be a necessary outbuilding.

The trial judge was somewhat familiar with the surroundings. Certain photographs were introduced which made the situation plain to him. It is manifest that the conclusion reached by him is likely to be more reliable than one arrived at by us from an examination of the printed record. We therefore do not feel justified in interfering with his judgment as to the necessity for such removal.

The decree is affirmed, with costs to plaintiffs.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

PEOPLE v. MARTIN.

1. APPEAL AND ERROR—EVIDENCE—ADMISSIBILITY—SAVING QUESTION FOR REVIEW.

Assignments of error based on the admission or exclusion of testimony will not be considered by the Supreme Court, where there was no objection; the error must appear on the face of the record.

2. CRIMINAL LAW—RAPE—EVIDENCE—ADMISSIBILITY—HARMLESS ERROR.

In a prosecution for statutory rape, testimony by a police officer that he saw the complaining witness and asked her

what the trouble was, but that she did not answer, *held*, not prejudicial.

3. SAME—LESSER OFFENSES—INSTRUCTIONS—TRIAL.

In such prosecution, the trial judge properly instructed the jury as to the lesser offenses, viz., assault with intent to commit rape, and assault and battery, and instructed them that they might convict of either in the event that they did not find defendant guilty of rape.

4. SAME—NEW TRIAL—JURISDICTION—STATUTES.

Two terms of court having elapsed since the denial of a motion for a new trial, the trial court was without jurisdiction to entertain a motion to set the same aside under 3 Comp. Laws 1915, § 15836.

Error to recorder's court of Detroit; Wilkins (Charles T.), J. Submitted October 17, 1919. (Docket No. 113.) Decided December 22, 1919. Rehearing denied April 10, 1920. See 210 Mich. 139.

Harry Martin was convicted of assault with intent to commit the crime of rape and sentenced to imprisonment for not less than 2½ nor more than 10 years in the State prison at Jackson. Affirmed.

George B. Murphy, for appellant.

Alex. J. Groesbeck, Attorney General, *Matthew H. Bishop*, Prosecuting Attorney, and *Van H. Ring*, Assistant Prosecuting Attorney, for the people.

SHARPE, J. The respondent was charged with having, on the 4th day of June, 1918, committed the crime of statutory rape upon Anna Jaracz, a female of the age of 15 years. He was convicted of assault with intent to commit such crime, and, on November 1, 1918, sentenced to Jackson prison for a maximum period of 10 years and a minimum of 2½ years.

At the time of the trial, respondent was represented by Attorney James R. Neill. A motion for a new trial was made by him on August 24, 1918, before sentence, and denied. Thereafter, and on May 29, 1919,

the present attorney for said respondent was substituted for Mr. Neill. On June 10, 1919, he moved the trial court to set aside the order made denying a new trial and enter an order granting same. Many affidavits were filed by him in support of this motion. It was denied and respondent now seeks a review in this court by writ of error.

The assignments relate:

- (1) To the admission of testimony.
- (2) To the charge of the court.
- (3) To the refusal to grant a new trial.

The facts on which the prosecution relies to support the conviction are, briefly, as follows:

On the 4th day of June, 1918, the respondent was employed as a paper hanger for Isadore and Hyman Greenberg, who conducted a store at 1745 Michigan avenue, in the city of Detroit. They were dealers in wall paper and took contracts for papering residences. Respondent was at that time 42 years of age, married and living in Detroit with his wife. Anna Jaracz was also employed by the Greenbergs, and had been since May 1, 1918. She waited on the trade in the store. There are four rooms in the store, which at one time had been used as a dwelling house. Behind the front or show room was a stock room, and back of it a smaller stock room, formerly a bedroom. On the day in question, respondent was at work hanging paper in the home of Charles Gronau, a few blocks distant from the Greenberg store. During the forenoon, Mrs. Gronau expressed a desire to have some of the paper changed, and respondent offered to have the exchange made at lunch time. About 11:30 he went to the store for that purpose. Anna was there alone, and she claims that he followed her into the smaller stock room when she went there for the paper and there assaulted her and committed the crime charged. She says that Isadore Greenberg came into the store im-

mediately after the offense was committed, and he testified that she ran to him and fell into his arms and fainted, and that respondent then said, "I just wanted to scare her." The respondent went back to his work and a few hours after was arrested and has been confined since that time. Greenberg and several others testify that there was blood on Anna's clothing, and an examination by Dr. Watson, two days after, revealed the fact that her person had been recently violated.

The respondent was sworn in his own behalf and, while admitting that he was at the store for the purpose stated, denied that he had in any way committed any assault on Anna or had sexual intercourse with her.

1. It is the claim of the prosecution that there was no objection by respondent's counsel to the testimony which he claims was improperly admitted. The most serious complaint is that Kate Jaracz, mother of Anna, was permitted to testify to what Anna told her when she arrived home several hours later. Quoting from the record:

"Q. Did Anna say what had happened to her?

"A. Yes.

"Q. Told you all about it?

"Mr. Neill: I object; that would be hearsay that she told all about it.

"Q. What did she tell you occurred?"

No further objection was made, nor was any motion made to strike out the testimony. The court no doubt understood that the objection was made to the witness stating that Anna had told her "all about it," and not to her relating in detail what Anna had said to her. This court has many times refused to consider assignments of error in the admission or exclusion of testimony, where the same was received without objection. The error must appear on the face of the record. In

People v. O'Brien, 92 Mich. 17, in which respondent was convicted of murder, it was said:

"Many of the assignments of error relate to the admission or exclusion of testimony, to which no objection was made or exception taken. They cannot, therefore, be now considered. If we understand respondent's counsel correctly, he assigns error upon these for the purpose of showing in this court that the respondent has not had a fair and impartial trial. If this were so, the defendant and his counsel would be responsible for it. If his counsel considered offered testimony to be inadmissible upon any ground, it was their duty to object, and, failing in this respect, he cannot be heard to complain in this court."

The rule thus laid down has, we believe, been uniformly followed in this court.

The 8th assignment of error is based on an objection made to a question asked Police Officer Barnes, who saw Anna at the store shortly before the arrest was made. A careful reading of his testimony does not show that he testified to any facts stated to him at that time by her. On the contrary, he says, "she didn't give me any answer," and adds that as Greenberg had told him about it he told her that he "would go over and get the man." We cannot see anything prejudicial to the respondent in any of the testimony, voluntary or otherwise, given by this witness.

2. Error is alleged on that portion of the instructions in which the court defined the lesser offenses included in the crime charged, viz.: Assault with intent to commit rape, and assault and battery, and instructed the jury that they might convict of either of these in the event that they found the respondent not guilty of the crime charged. There is no complaint made of error in the language used in such instruction, but the claim is broadly made that the evidence showed the respondent to be guilty of rape, if at all, and that the jury should have been so instructed.

208—Mich.—8.

Counsel for respondent, in support of this contention, relies on the cases of *People v. Partridge*, 86 Mich. 243, and *People v. Rivers*, 147 Mich. 643, in both of which it was held that on an information charging rape, with an added count charging felonious assault and taking indecent liberties, where the only testimony given, if true, established the crime of rape, a conviction under the second count would not be permitted to stand. This holding was, as stated in the first of these cases, because "there was not a scintilla of evidence to support the second count," and, both being statutory offenses, that charged in the second count was not included in the offense charged in the first count.

But the crime of which respondent was convicted is included in that with which he was charged. It was the duty of the court under our repeated decisions to so charge. *Hall v. People*, 47 Mich. 636; *People v. Abbott*, 97 Mich. 484; *People v. Ryno*, 148 Mich. 137. A similar question was raised in *People v. Miller*, 96 Mich. 119. At page 120, it is said:

"It is true that upon this record the proof upon one side shows the completed act of sexual intercourse with a girl under the age of 14 years, while upon the other a denial of any offense is made. Under such proof it cannot be denied that a verdict of assault with intent to rape is illogical. But an assault with intent to commit rape is necessarily included in every rape. The defendant's counsel are alleging, not an injurious error, but one which, if it could be called an error, has resulted to defendant's advantage."

We find no error in the instruction given.

3. As before stated, a motion for a new trial was made before sentence, and denied. On June 10, 1919, two terms of the court having in the meantime elapsed, a motion was made to set aside the order denying the same. While the court apparently passed on the merits of the motion in denying it, it clearly had no jurisdic-

tion under our decisions to hear the same. This question has been so recently passed on in *Nichols v. Houghton Circuit Judge*, 185 Mich. 654 (Ann. Cas. 1917D, 100), in which the authorities are collected and discussed and the conclusion therein reached approved in *People v. Ayres*, 195 Mich. 274, that we content ourselves with a reference to these cases in concluding that the record shows no error in this respect.

Finding no reversible error, the conviction and sentence must stand affirmed.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

CANDLER v. HEIGHO.

1. APPEAL AND ERROR—EVIDENCE—DIRECTED VERDICT.

In reviewing a directed verdict in favor of defendant, the Supreme Court will view the testimony in the light most strongly tending to support the claim of plaintiffs.

2. FRAUD—REPRESENTATIONS—ELEMENTS OF ACTION.

In order to make misrepresentation actionable, there must be a reliance upon the representation.

3. SAME—RELIANCE UPON REPRESENTATIONS—DIRECTED VERDICT.

Although defendants, officers and stockholders of a corporation, misrepresented to the administrator of an estate the value of certain shares of the stock of the corporation inherited by plaintiffs, and bought it for much less than its book value, such misrepresentation was not actionable where the proofs conclusively show that the administrator fully investigated and placed before plaintiffs the facts as to its book value before the sale, and no reliance was placed upon such misrepresentation.

On degree of certainty necessary to establish fraud in a civil action, see note in 33 L. R. A. (N. S.) 836.

Error to Wayne; McDonald (John S.), J., presiding. Submitted October 9, 1919. (Docket No. 23.) Decided December 22, 1919.

Case by Mary V. Candler and another against George W. Heigho and others for fraud and deceit in the sale of corporate stock. Judgment for defendants on a directed verdict. Plaintiffs bring error. Affirmed.

J. O. Murfin, for appellants.

Stellwagen & MacKay (Alex. J. Groesbeck, of counsel), for appellees.

SHARPE, J. The plaintiffs are the wife and daughter of Claudius H. Candler, who died in the city of Detroit on February 24, 1910. Prior to his death, Mr. Candler had been the president and superintendent of the Calvert Lithographing Company. At the time of his decease, he owned 1,700 shares of its capital stock or $17/40$ ths of a total capitalization of \$200,000, consisting of 4,000 shares of a par value of \$50. At that time there were but 12 stockholders in the corporation. The stock was not listed for sale on the general market, nor had it been for years. The officers of the corporation at the time of Mr. Candler's death were himself as president, the defendant Ross as vice-president, and the defendant Heigho as secretary and treasurer, and these three constituted the board of directors. On March 16, 1901, the corporation had adopted a by-law which provided that—

"Any stockholder of this corporation who shall be desirous of selling any of his shares, the executor or administrator of any member deceased, and the grantee or assignee of any shares sold on execution or mortgage sale, shall cause such share or shares respectively to be appraised by the board of directors which it shall be their duty to do on request. If the owner,

executor, administrator or assignee aforesaid shall feel aggrieved at the appraisal of the board he may so notify the board in writing and designate therein one appraiser, and the board shall thereupon designate another, and they together shall select a third, and the appraisal of such three appraisers (hereinafter called award) after hearing the parties and an examination of the books of the company, if they so desire, shall be final and binding." * * *

It further provides that after such value is fixed by an appraisal or award the directors may buy the shares for the other stockholders, and that they should then be assigned, but that, if not so purchased within 60 days, they may be sold to any person in the usual way. At the time of its adoption, the stock in the corporation was held as follows: Calvert owned 2,482 shares, Candler 1,222, Ross 246, and Heigho 50.

Soon after Mr. Candler's death, Alexander K. Gage, the husband of the plaintiff Gertrude Candler Gage, was appointed administrator of the estate. He was an attorney, and at that time was in the active practice of his profession in the city of Detroit. Mr. Gage was familiar with the provisions of the by-law above referred to, and after Mr. Candler's death talked about it with the defendant Heigho. On May 31, 1910, Gage, as administrator, wrote the corporation, requesting that the stock held by Mr. Candler at the time of his decease be appraised by the board of directors pursuant to the by-law. On June 3, 1910, the corporation by letter advised him that such appraisal had been had and the value of the stock fixed at par, \$50 per share. On June 9th, Mr. Gage acknowledged receipt of the letter and said he would give the matter prompt attention. On June 24th, Heigho as president reminded him of such promise, and on July 11th Gage wrote that he was not prepared to accept the value of the stock as appraised, and requested that the stock be transferred to him as administrator. On July 13th,

the corporation again wrote him, requesting that if dissatisfied with the appraisal he comply with the by-law and appoint an arbitrator, and declined to transfer the stock to him. On August 13th, Gage notified Heigho by telephone that he would accept the price fixed by the appraisers, and the stock was soon thereafter transferred and paid for at that price. Five hundred dollars was added as estimated dividends up to the time of Mr. Candler's death.

There is no claim made by plaintiffs that they were in any way influenced in the sale by the acts or representations of the defendants made direct to them. In fact, no personal interview or communication was had between any of them concerning it, except that Mr. Heigho on several occasions expressed a desire for a personal interview with the plaintiffs about it, and on June 20th, Mrs. Candler wrote the board of directors declining such interview and saying,—

“we have left the matter entirely in the hands of Mr. Gage, who is the administrator and who has full power to act for us.”

Mr. Gage had many interviews with Mr. Heigho while the matter was pending, at some of which the other defendants were present. He was furnished with a copy of the report, presented to the stockholders by Mr. Candler as president, for the years 1908 and 1909, in which the condition of the corporation, both financial and otherwise, was set forth at considerable length. He expressed to the defendants a desire to keep the stock for the benefit of plaintiffs, and says they insisted on a sale under the by-law. He claims they refused to permit him to examine the books, but admits that from the information he got, and after going over the matter with others, he knew that the book value at the time of the transfer was \$81 per share. Gage reported to the plaintiffs the result of all of his interviews with the defendants; showed

them the correspondence that passed between them, and advised them that—

“if they were to resort to legal procedure, if they were to resort to the arbitration that they would find that the stock was worth more than these men had said it was.”

F. G. Rolland was a stockholder in the corporation. He had purchased some of Mr. Calvert's stock after his death, paying \$47 a share for it. He had charge of the sales in the western district, with headquarters at Chicago. On March 4, 1910, Heigho wrote him relative to his conferences with Mr. Gage about the transfer of the stock. In this letter he said:

“I explained in careful detail at first the unwisdom of Mrs. Candler holding the stock even if she were free to do so, and then went further and stated that it was impossible for her to do it under the by-laws.

* * *

“I submitted to him in a tentative way my idea of what Mrs. Candler should do in the matter of selling her stock to us, and it seemed to impress him very favorably. He is evidently very strongly desirous of getting in here and he or some members of the family may approach Mr. Ross, Mr. Huetwohl or yourself. In case this is done, you will, of course, be very diplomatic in what you say, and it may be wise to compare notes with me before you make any reply. In fact, if you receive any communication from them, you had better come over and hold a consultation with us collectively before you make any reply, if it seems to you to be at all advisable to do so.

“The more I think of the whole matter the more I am convinced that we can work it out to the satisfaction of everybody interested and without leaving any sore spots, but we must protect our own interests.”

Two expert bond salesmen, Mr. Noble and Mr. Nebe, of Detroit, testified that the book value of the stock at the time of the transfer was \$81 per share.

Mr. Heigho was cross-examined under the statute permitting same and admitted that the stock was paid

for by a loan secured by a note of himself and the other stockholders, and that this note was paid within 18 months out of insurance money received from a policy carried by the corporation on the life of Mr. Candler and the profits of the corporation.

The declaration, after describing the nature of the corporate business and the interests of the several defendants therein, and alleging the death of Mr. Candler and the appointment of Mr. Gage as administrator and setting out at length the by-law referred to, contains the following allegation:

"Plaintiffs further aver that at the time of his death the defendants, guided and directed largely by the defendant Heigho, fraudulently, wrongfully and maliciously combined and conspired to acquire from these plaintiffs the aforesaid seventeen hundred shares of the capital stock of the said Calvert Lithographing Company, formerly owned by Claudius H. Candler, at a grossly inadequate price and for a figure far below the real value of the stock aforesaid."

It further alleges that the defendants Heigho and Ross were appointed appraisers of the Candler estate and valued the stock in question at \$45 per share; that the plaintiffs were ignorant of business methods and details and, being apprehensive for their future livelihood, were imposed on by defendants and induced to consent to the transfer of the stock at much less than its fair value; that the relations existing between defendants and plaintiffs were of such a confidential and fiduciary character that it was the duty of defendants to fully and fairly disclose to them all the facts which would have any bearing on the fairness of the transaction; that such representations as defendants made were false, and known by them to be so, and that in reliance thereon, and because of the wrongful and fraudulent acts and conspiracy of the defendants, the stock was transferred at a grossly inadequate value and that plaintiffs sustained great damage thereby.

At the conclusion of the plaintiffs' proofs, the trial court directed a verdict for the defendants for the reason that, no matter what misrepresentations were made by defendants as to the value of the stock, it was clear to him that the administrator did not rely thereon as he admitted that he then knew the book value of the stock to be \$81 per share. From the judgment entered on such verdict the plaintiffs appeal.

There are several assignments of error, among them being that the court erred in directing a verdict for the defendants. We have set forth the testimony at considerable length for the reason that in the consideration of this action on the part of the trial court it must be viewed in the light most strongly tending to support the claim of the plaintiffs. There is no conflict of opinion as to the character of the proofs which plaintiffs must have submitted to entitle them to the verdict of a jury. It is well stated in 20 Cyc., at page 13:

"The general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery."

That these several elements of such a charge must be established has long been the rule in this State. *Parker v. Armstrong*, 55 Mich. 176; *Frohlich v. Deacon*, 181 Mich. 255; *Kimble v. Gillard*, 177 Mich. 250. In the latter case the court said:

"It is a well-settled rule, familiar and fundamental, that, in order to make misrepresentation actionable, there must be a reliance upon the representation."

But if we concede, as did the trial judge, that there was sufficient evidence supporting the other elements to take this case to the jury, we feel constrained to hold, as he did, that the proofs clearly show that the administrator did not rely on anything that the defendants said in making the sale. He became convinced that the stock had a book value of \$81. This was the same as that fixed by the bond salesmen who were called. He acted entirely on the information acquired from the reports furnished him and the independent investigation which he made. He realized fully that he had the right, and the defendants were urging him to exercise that right, to have the value of the stock fixed by arbitration under the provision in the by-law therefor. If he doubted the validity of the by-law, he was in no way prevented from testing it in any proper legal proceeding.

Conceding it to have been the duty of defendants to have rendered a fair and frank disclosure of all the facts affecting the financial condition of the company and the value of the stock, even if not asked for, how can any liability for a violation of such duty be predicated on a failure to disclose facts already within the knowledge of the administrator and which had been communicated by him to plaintiffs. How can it be said that any action or non-action, any information given or concealed, or any intent to deceive or defraud on the part of the defendants, in any way affected the judgment of the administrator or of the plaintiffs in deciding upon the wisdom of accepting the appraised value?

Neither the administrator nor the plaintiffs were unduly hurried in arriving at a decision. Mr. Gage admits that on June 26th he informed the defendants that he knew the book value of the stock was as stated. The transfer was not made until July 13th. During that period he had plenty of time, not only to advise

with plaintiffs but to take counsel concerning the advisability of submitting the question of value to arbitration or obtaining a judicial determination of the legal effect of the by-law. He admits that he submitted all the facts of which he was possessed and the conclusion he had reached therefrom as to the value of the stock to plaintiffs, and, while he says that he did not recommend either way, they finally decided to accept the appraised value. We are constrained to hold that any loss they sustained thereby is not recoverable in this action and that the verdict was properly directed for the defendants.

The conclusion reached renders it unnecessary to consider the other assignments of error.

The judgment is affirmed.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

RICE *v.* MICHIGAN RAILWAY CO.

1. CARRIERS—STREET RAILWAYS—DUTY TO INTENDED PASSENGER—
NEGLIGENCE—QUESTION FOR JURY.

In an action for personal injuries, testimony by plaintiff that, intending to take defendant's interurban car, he went upon the platform at the small waiting room, signaled the car to stop, and was answered by a signal by the motorman, advising him that it would stop, that he stood near the edge of the platform expecting the car to stop, when, instead of doing so, it went by at a rate of speed of from 50 to 60 miles an hour, that he was caught

in the suction of the car and seriously injured, and by the motorman that no signal nor answer thereto were given, *held*, to present a question of fact for the jury as to defendant's negligence.

2. SAME—RELATION OF CARRIER AND PASSENGER—INTENDED PASSENGER.

It is the general rule that the relation of carrier and passenger commences when a person with the good-faith intention of taking passage, and with the express or implied consent of the carrier, places himself in a situation to avail himself of the facilities for transportation which the carrier offers.¹

3. SAME—TRIAL—INSTRUCTIONS—DUTY OF CARRIER.

An instruction by the court that if the jury believed plaintiff's testimony, it was the duty of defendant in all ways to exercise a very high degree of care for his safety or protection in the operation of its car, *held*, not erroneous.

4. SAME—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Testimony *held*, sufficient to justify a finding by the jury that plaintiff was injured in the manner claimed by him, and that defendant's negligence was the proximate cause of his injury.

5. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT.

Where plaintiff was in a position of safety when he gave the signal to stop and received the answer thereto, had the car stopped as he had a right to expect it would, and he had but little time after discovering that it was not going to stop before it rushed by, it cannot be said, as a matter of law, that he was guilty of contributory negligence because he failed to step back or because he acted in a manner not afterwards found to be in the interest of his personal safety.

6. SAME—TRIAL—INSTRUCTIONS—THEORY OF DEFENSE.

An instruction by the court that if the jury found that plaintiff stood on the platform with an arm extended so close to the track that the car struck it and caused the accident, plaintiff would be guilty of contributory negligence and could not recover, *held*, to fairly present to the jury defendant's claim as to the cause of plaintiff's injury.

¹For authorities discussing the question of effect of signaling car to make one a passenger are collated in notes in 13 L. R. A. (N. S.) 283; 25 L. R. A. (N. S.) 407; L. R. A. 1916C, 1022.

7. SAME—APPEAL AND ERROR—TRIAL—INSTRUCTIONS—ISSUES.

Where the charge of the court clearly submitted to the jury plaintiff's claim that the negligence complained of was the running of defendant's car past the platform at a high rate of speed after signaling an intention to stop, an objection that plaintiff's action was based on mere failure to stop for a passenger is untenable.

8. APPEAL AND ERROR—TRIAL—INSTRUCTIONS—CHARGE AS WHOLE.

The charge should be considered as a whole, and the portion objected to should be read and considered in connection with all other portions of the charge given bearing upon the same subject.

9. CARRIERS—APPEAL AND ERROR—TRIAL—INSTRUCTIONS—CHARGE AS WHOLE.

The giving of plaintiff's requested instruction as to defendant's duty to a passenger, stating a broad proposition of law applicable to such cases, but making no application to the particular facts, while unfortunate, *held*, not prejudicial, in view of the fact that in other portions of the charge the court properly instructed the jury as to the duty defendant owed to plaintiff as an intended passenger.

10. APPEAL AND ERROR—REFUSAL TO GIVE REQUESTS COVERED IN CHARGE.

Refusal of the court to give certain requests proffered by defendant, which might well have been given, but which merely stated negative propositions whose force and effect were fairly covered in the charge as given, *held*, not erroneous.

11. TRIAL—ARGUMENT OF COUNSEL.

Although plaintiff's counsel, in his argument to the jury, discussed matters which the court later in his charge withheld from their consideration, this court will assume that the jury realized it was their duty to be governed by the instructions of the court as to the law and not by the argument of counsel, where it appears that defendant was not prejudiced.

12. NEW TRIAL—OVERWHELMING WEIGHT OF EVIDENCE.

The verdict of the jury in favor of plaintiff *held*, not so overwhelmingly against the weight of the evidence as to call for a new trial.

13. DAMAGES—EXCESSIVE VERDICT—PERSONAL INJURIES.

A verdict for \$13,800, *held*, not excessive on a showing that plaintiff received serious and painful injuries which are permanent, that his usefulness as a physician is impaired, that he will never be able to do any surgical work, that at the time of his injury he was 52 years old, that his income previous to his injury was more than \$300 a month, that he was unable to practice for eight and one-half months, and was confined to bed for eight weeks.¹

Error to Shiawassee; Collins (Joseph H.), J. Submitted October 16, 1919. (Docket No. 57.) Decided December 22, 1919. Rehearing denied April 10, 1920.

Case by L. Frank Rice against the Michigan Railway Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Sanford W. Ladd and Justin R. Whiting (Warren, Cady, Ladd & Hill, of counsel), for appellant.

Neil R. Walsh Albert L. Chandler, and O. J. Hood, for appellee.

SHARPE, J. The plaintiff, a practicing physician residing in Owosso, took defendant's car on the evening of February 16, 1917, to visit a patient several miles distant. About eight o'clock, he returned to the point where defendant's road crosses the highway known as the Grand River road, where a small waiting room, with platform in front, had been theretofore constructed. He knew that a through car on defendant's line would pass there about that hour, and that it would stop for passengers on being signaled. It is his claim that as the car approached the crossing from the south, and when about 35 rods distant, he signaled it to stop by waving his arm; that the car did not stop, but passed by at a speed of from 50 to 60 miles per hour; that, expecting it to slacken and stop, he stood near the edge of the platform and

¹On excessiveness of verdicts in actions for personal injuries other than death, see comprehensive note in L. R. A. 1915F, 30.

was caught in some way by the suction of air, thrown against the building and then the car, and badly injured.

The defendant moved for a directed verdict at the close of the plaintiff's case and also at the conclusion of the testimony. These motions were denied. The plaintiff had verdict and judgment for \$13,800, and the defendant appeals. While there are 92 assignments of error, the defendant's counsel discuss them under the following heads:

(1) No negligence on the part of the defendant was proven and a verdict should have been directed in its favor.

(2) The plaintiff was guilty of contributory negligence.

(3) Error in the charge of the court.

(4) Error in the argument of plaintiff's counsel.

(5) Defendant's motion for a new trial should have been granted.

These will be considered in the order stated.

1. The claim of negligence as submitted by the court in its charge to the jury was as follows:

"3. Plaintiff further claims that while he was standing on the platform he noticed the headlight of a car coming from the south towards Owosso, and that when the car was some thirty-five or forty rods south of the station building, he signaled it by waving his hand, and that thereupon, the motorman of the car responded by blowing two short blasts of the whistle on the car. That the car did not stop at the station, but passed by at a high rate of speed, coming so close to the plaintiff that the suction and the wind caused by the passing of the car, caught the overcoat and clothing of the plaintiff, and threw him from the position where he stood, over to and against the car, and by reason thereof, he was seriously injured. And he further claims that at the time of such accident, he was guilty of no negligence which contributed to the injury, but was acting with due care and reasonable precaution. * * *

"9. I further charge you in this case that if you should find upon the night in question that the plaintiff signaled for the car to stop and that the motorman answered such signal with the usual answer of two short blasts of the whistle, then I charge you it was the duty of the defendant to have slowed down the car and brought it to a stop at the platform of the station so that plaintiff could have safely had access thereto; and if you should find that defendant did not do this, then it would be guilty of negligence and plaintiff would be entitled to recover; if you should further find that defendant's failure to slow down the car was the proximate cause of the accident and that plaintiff himself was free from any negligence that contributed to the injury."

He also gave plaintiff's request to charge as follows:

"14. In this case, I charge you that if you believe from the evidence that on the 16th of February, 1917, the plaintiff in good faith came to the depot of the defendant and upon the platform of the defendant for the purpose of taking said car for passage to the city of Owosso; that at that time and place that he signaled the defendant's trainman when about four hundred feet or more away, and that said trainman answered said plaintiff's signal for the purpose of accepting him as a passenger, then I charge you that plaintiff then and there became a passenger and it was the duty of the defendant in all ways to exercise a very high degree of care for his safety or protection in the operation of the car and the maintenance of its road, and in deciding whether or not the defendant performed that duty you have a right to consider the lighting of the platform, the rate of speed the car was running at the time of the accident and all the surroundings at the place of the accident, and if you find that the defendant violated its duty to render that high degree of care for the plaintiff that an ordinarily prudent person engaged in the same kind of business would have done under the same or similar circumstances and conditions, then I charge you that the defendant is guilty of negligence and the plaintiff is entitled to recover."

It is conceded that the car in question should have stopped at this way station if signaled to do so; that no particular kind of signal was required; that anything which apprised the motorman that a person was waiting to take the car was sufficient, and that two short blasts of the whistle was the customary way in which notice would be given that the signal had been observed and that the car would stop. The waiting room was a small frame building, about 9 by 10 feet, and between it and the tracks of defendant was a platform about 5 feet wide, the outer edge of which was about 3 feet from the nearest rail of defendant's track. There is a step leading to the platform from the south end. On the night in question, there was no light in the waiting room or on the platform. Plaintiff testified that the night was cold and he was wearing a heavy fur overcoat; that he had his medicine case under his right arm; that he was familiar with the surroundings, having often taken a car there; that after he had given the signal by waving his left arm, and heard the answer thereto, he stood near the edge of the platform, expecting the car to stop; that when it passed it was going at the rate of 50 or 60 miles per hour; that—

“the wind or the suction or whatever you call it, made a regular top of me. I was facing the south there, and it whirled me right into that car, into the side of the car, towards the latter end of it. Now, that is just what took place.”

He was asked: “Q. To what extent was there a suction from that car when it went by there?” and answered, “A. Why, it was terrific, I call it.” His shoe was torn from his left foot and the heel partly ground up. Defendant's motorman denied that he saw any signal given or that he answered it, as claimed by plaintiff, and he testified that when the car was about

20 feet from the plaintiff he saw a man's hand go up, that the car hit it, and that he stopped as soon as he could do so and within 800 or 900 feet. He says the car was traveling at about 45 miles per hour. The conflict in the testimony of the plaintiff and the motor-man as to the giving of the signal and the answer thereto presented questions of fact for the jury, and under the instructions given, in view of the verdict rendered, must be considered as having been determined in plaintiff's favor. In the further consideration of the errors assigned, we may therefore treat these facts as established by the proofs.

There was considerable evidence offered on both sides as to the effect of the suction of air produced by a rapidly moving car on a person standing within a few feet of it. George Cook, a farmer who lived near the crossing, said:

"Q. Witness, have you stood by one of those street cars that was passing rapidly by on that track, to notice whether there was a suction to that car when the car went by?

"*Mr. Whiting*: I desire to object to that unless it is given more in detail, what the car was and what the conditions were.

"Question read.

"*The Court*: He may answer.

"A. Why, I have stood near them at times. I have a front gate, when I lived there to the crossing, that went from the yard out over the railroad into the highway. It is very close to the gate. It is so close, really, that we never allowed it to be swung except the one way, in, and probably within 4 or 5 feet of the track, just a little ways.

"Q. How do you describe the suction to any of those cars that are going through from 30 to 40 miles an hour?

"*Mr. Whiting*: I desire to have my same objection.

"*The Court*: Very well.

"*Mr. Whiting*: To all of this line of testimony, incompetent and irrelevant.

"A. There is a draft, a suction. The conductor sometimes, or motorman, would throw paper off at times, used to give me an evening paper sometimes when he would have one. I have had them drop a little short of the mark and roll along after the car, you know, as it would be going along at a rapid rate and there is a great suction there."

Defendant's general superintendent, Clinton E. Morgan, testified as to certain experiments that had been made as to the force and effect of such suction; that the general direction of the air force produced by the car is away from it, that it leaves an air pocket or vacuum behind the car, and that he had never seen a person or object sucked into the side of a single motor car. On cross-examination he testified:

"Q. What would be the effect of this air current you speak of, this outward current, if a building 8 by 10 and 8 feet high, were placed in the path of this air current?

"A. It would have a tendency to shove the building over. * * *

"Q. If it didn't blow it away, what would be the effect?

"A. When the car went back, that is, went by, the vacuum behind would have a tendency to kind of pull it in towards the track. * * * I have tried several means of measuring that vacuum behind the car, but I haven't been able to find a contraption to measure that air behind there. You can't catch it. It is there, there is a vacuum there. You have got to have something to pass that air through. * * *

"Q. * * * Isn't it true, if a man had on a big overcoat and standing there when the car, we will say—suppose he was standing to the south, in this way, and the car comes by, and he has on this big fur overcoat, standing there, and when the head of the car comes by and that current of air came around the corner of that car, would you not think that there would be a heavy pressure on the man standing there?

"A. It would shake him a little bit.

"Q. Shake him a good deal, wouldn't it?

"A. Not much."

R. C. Taylor, the superintendent of equipment of the defendant company and a mechanical engineer of many years' experience, was called by defendant. He testified as to the improbability of the plaintiff receiving his injuries in the manner claimed by him. His testimony differed greatly from Mr. Morgan's in his estimate of the air pressure produced by a rapidly moving car. In the course of his examination he said:

"I should think if a car was going 66 feet in less than a second and a hard substance of the car came in contact with a hand held out, that the impact would cause some mark on the hand if it impinged against the car, it would make a scratch, bruise or mark, or even break it off. I would think it would make a mark. * * * It is impossible to give any description of what occurred, so as to swing him around to such an extent so as to throw his feet under the car, but it is quite conceivable how it could be done. I have seen it done in other cases. I have seen it done upon the western division of the Michigan Railway. There a lady held her hand out in front of the car. It rolled her all over the place. I mean, it threw her down, rolled her down a bank, rolled her over two or three times, and she only got hit in the hand, and it didn't break her hand, and the car was going 80 miles an hour. It marked her hand, but it didn't break it. It didn't break her hand. That is the only instance like that that I know of personally."

That the passing of a car, going at a high rate of speed, will create some considerable disturbance in the air, and thus affect a person standing near it, is apparent from the testimony. This court, in *Richardson v. Railway Co.*, 176 Mich. 413, seemed to take judicial notice that a suction would be created by the passing of a train of cars and that the effect thereof might be sufficient to draw the skirts of a woman standing near by into the wheels of the train. At page 423, it is said:

"If this train was running at the rate of speed claimed for it by plaintiff's witnesses, it is apparent

that the suction from the rapid motion of the train may have drawn the skirts of decedent into the driving wheel, or machinery, causing the marks or grease spots described upon her clothing, and tearing her clothing from her hips, and winding it around her feet, as described by the doctor. This might draw her legs into the machinery, and may have severed the one and broken the other, as described."

The facts in *Great Falls, etc., R. Co. v. Hammerly*, 40 App. Cas. D. C. 196, were quite similar. In the statement of facts it is said:

"Between 9 and 10 o'clock at night she (plaintiff) was upon the station platform waiting to board a car. She saw one approaching, heard it whistle, stepped towards the front of the platform, * * * and waved her hand for the car to stop, but it did not; 'that it turned her around and she fell,' and one of her feet was struck by the car. * * * The whistle did not sound as the car reached the platform, and there was nothing to indicate that the car would not stop. There was evidence that it was going very fast, and that its speed did not lessen as it passed the station. When it was about 50 or 100 feet distant, plaintiff realized it would not stop 'as it was running too fast'; did not then change her position, because 'you wouldn't have time to think, much less move.'"

In the opinion written by Mr. Justice Robb and concurred in by the other Justices it was held:

"In the present case we think the question of the defendant's negligence and of the plaintiff's contributory negligence was clear for the jury to determine. The plaintiff desired to take the car, and, to effect that purpose, it was necessary for her to signal it to stop. There was nothing to indicate to her that her signal would not be effective; in other words, she had no reason to believe, when she stepped towards the front of the platform, that the car would not respond to her signal. Whether the conductor was legally bound to stop we need not determine, since it is sufficient for the purposes of this case that plaintiff had reason to believe he would. Having reason to believe the con-

ductor would respond to her signal, she was justified in assuming a position which she would not otherwise have been justified in assuming. The evidence was to the effect that she at no time voluntarily placed herself sufficiently near the edge of the platform to be struck by the car. This leads to the further observation that under the evidence it was competent for the jury to find that the speed of the car as it passed the station was the cause of the plaintiff's fall and consequent injury. It was well known to the defendant that prospective passengers would assemble at its suburban stations in the expectation of boarding its cars. Knowing this, did it fulfill its obligation to such prospective passengers who, as we have previously suggested, were then constructively in its care, when it not only failed to stop its car in response to their signal, but rushed that car by the station as fast as it could go? We think not. Having impliedly invited prospective passengers to assemble upon its platform, and having given such prospective passengers reason to believe its cars would be stopped upon their signal, it was clearly its duty in passing such a point to take such reasonable precautions as would, in the circumstances, properly insure their protection. The rule applicable to express trains that stop at scheduled points only has no relation to an electric railway car that is supposed to stop at all stations if signaled. It might constitute contributory negligence for a prospective passenger to place himself so near the edge of the platform of a station at which an express train was not scheduled to stop, as to be affected by the passing of such train, while such passenger would be justified in assuming the same position for the purpose of signaling an approaching electric car that was expected to stop.

"In the present case the evidence is to the effect that the signal was given in ample time to have permitted the stopping of the car. The plaintiff was in a position of safety, had the car either stopped or passed at a reasonable rate of speed. When the car was within 50 or 100 feet of her, she realized it would not stop because 'it was running too fast.' It is urged that she was negligent in failing immediately to step back. Assuming that the car was going 50 miles an

hour, and we think the jury would have been warranted in finding that to have been its speed, it was going 73 $\frac{1}{3}$ feet a second. Plaintiff fixed the distance of the car from her when she realized it would not stop at about 50 or 100 feet. It is apparent, therefore, that only about a second of time interposed between her realization that the car would not stop and the accident. To say that a woman weighing nearly 200 pounds, situated as she was, startled as she may have been,—indeed as she says she was,—was guilty of contributory negligence because she permitted a second to elapse without getting out of the way, would be to usurp the functions of the jury. Clearly, it was for them to decide, as practical men, whether plaintiff's conduct was not natural and reasonable."

While we do not assent to all that is said as to the plaintiff being a passenger (a question later discussed herein), we are in accord with the reasoning of the court on the question of the contributory negligence of the plaintiff. See, also, *Trieber v. Railway Co.*, 134 App. Div. 661 (119 N. Y. Supp. 439).

It also seems apparent that the effect of such disturbance of the air on a man would be increased if he stood in a narrow space between a building and the passing car, as was the case here. The plaintiff testified positively that his injury was produced in that way, and we cannot find from the proofs, or from anything of which we may take judicial notice, that it was physically impossible to so occur.

Was the plaintiff constructively a passenger and did the defendant owe him a duty as such? Error in the court so holding is also discussed by counsel in his criticism of the charge of the court. We dispose of it here. We do not find that this court has passed upon the question as here presented. Assuming the facts to be as plaintiff testified, and as the jury found, we find him upon the platform at the waiting room maintained by the defendant for the accommodation of persons desiring to take passage on its cars, in-

tending to board this car. On its approach he gave a signal for it to stop, which was answered in the usual way and which advised him that his signal had been observed and that the car would stop. The motor-man then knew that an intended passenger was on the platform and it was his duty to so run the car past the platform as not to needlessly expose him to danger. We believe that duty is fairly expressed by defining it as that high degree of care to which a passenger is entitled. The rule is clearly stated in 6 Cyc. p. 536 *et seq.*:

"The relation of carrier and passenger commences when a person with the good-faith intention of taking passage, and with the express or implied consent of the carrier, places himself in a situation to avail himself of the facilities for transportation which the carrier offers. In case of a railroad this relation arises not merely when the passenger enters the train with the ticket already purchased, giving him a contract right to ride, but when he enters upon the premises of the carrier, with intention to take a train in due course. But one who is about the carrier's premises, without intent to be transported in due course, or after the abandonment of such intent, is not a passenger. One who enters upon the premises or takes passage on the train of a railway, with intent to become a passenger, but by mistake as to the proper place or proper train is not, by reason of such mistake itself, precluded from the rights of a passenger.

* * *

"To give rise to the relation of passenger and carrier there must be not only an intent on the part of the former to avail himself of the facilities of the latter for transportation, but also an express or implied acceptance by the latter of the former as a passenger. Until there is an acceptance, that is, until with the express or implied knowledge of the carrier or his employees the person seeking to become a passenger has indicated his intention to become a passenger, which intention has been in some way acquiesced in, at least to the extent of not refusing transportation, the relation does

not arise, even though the purpose of the person attempting to become a passenger is to pay fare when required. But just as there may be sufficient intent to become a passenger before transportation actually commences, so there may be an implied acceptance as to persons seeking transportation before they have entered into the train or other conveyance and it has started toward its destination. Those who by express or implied assent are waiting in the passenger room or in a standing car, for the departure of a train, or are crossing the premises of the carrier for the purpose of going upon a train, or are in the act of mounting the car steps, are passengers, provided their acts are such as are presumed to be known and assented to by the agents of the railroad company having authority in the matter, and regardless of whether or not a ticket has been purchased, if no rule or regulation of the company is being violated. But the mere fact of intention to go on board a car, which intention has not been, by acts or otherwise, indicated to the servants of the railroad company, does not render the person having such intention a passenger, although he may be entitled to transportation. It matters not that the person gets on board a train at an unusual or unauthorized place; if he is entitled to transportation he becomes a passenger from the time he gets on board the train."

The rule thus stated is abundantly supported by the authorities from other jurisdictions cited in the annotation to the text. The cases cited by defendant's counsel (*Georgia, etc., R. Co. v. Tapley*, 144 Ga. 453 [87 S. E. 473, L. R. A. 1916C, 1020]) are easily distinguishable. In these cases there was no acceptance, express or implied, of plaintiff as a passenger. To complete the relation, there must be an intent on the part of the passenger to take passage; a communication of such intent to the carrier, and an express or implied acceptance by the latter. *Brott v. Railroad Co.*, 220 N. Y. 92 (115 N. E. 273). In our opinion, there was sufficient testimony, in view of the surrounding circumstances, to justify a finding by the

jury that plaintiff sustained the injury in the manner claimed by him, and, if he did, we are of the opinion that the jury was also justified in finding that such negligence was the proximate cause of his injury.

2. Contributory negligence. It is the defendant's claim that plaintiff was guilty of contributory negligence, and that such fact is established by his failure to move back a few feet when the car was approaching. After the plaintiff had given the signal to stop and had received the answer thereto, he was in a position of perfect safety, even were he standing by the edge of the platform, had the car stopped as he had the right to expect it to do. A car traveling 45 miles an hour will pass over more than 65 feet each second. So that, between the time that he would have discovered that it did not intend to stop and the time it rushed by, he would have little time to act or even think of the danger in which he was placed. He could not but be confused and if, under the circumstances, he failed to step back, or acted in a manner which in cool deliberation we might find not to be in the interest of his personal safety, we do not think it can be said as a matter of law that he was thereby guilty of negligence which contributed to his injury.

The duty of a person about to take a train, or one who has business with a train about to stop at a flag station, is well stated in *Tubbs v. Railroad Co.*, 107 Mich. 108. We quote from page 115:

"We cannot say, as a matter of law, that persons having business with a train at a way station, at which the stop is but momentary, are guilty of negligence in not waiting until the train comes to a standstill. It is a fact open to every day observation that those awaiting the arrival of a train do not wait until the train stops, but, on the contrary, as the train approaches, those having business with the train take their position near the track, and wait for the train to come to a standstill. Indeed, this custom is so gen-

eral that it must be within the knowledge of those operating trains."

The court instructed the jury that if the plaintiff stood on the platform with an arm extended so close to the track that the car struck it and caused the accident, the plaintiff would be guilty of contributory negligence and could not recover. This instruction fairly presented the claim of defendant as to the cause of plaintiff's injury. The determination of this question of fact was for the jury. *Great Falls, etc., R. Co. v. Hammerly, supra.*

3. Charge of the court. These errors are largely based on the claim of defendant "that mere failure to stop a car for a passenger is not negligence upon which a personal injury action can be predicated." The instructions of the court heretofore quoted show clearly that the negligence of the defendant was not predicated on any such claim. Under the charge as given, recovery was not had by reason only of the negligence of the defendant in its failure to stop the car, but in its running its car past the platform at a high rate of speed after it had advised the plaintiff by an answer to his signal that it would stop.

Complaint is made of the following instruction, given at plaintiff's request:

"13. In this case, I charge you that the defendant is a common carrier of passengers for hire and that having accepted a passenger for transportation the defendant owes such passenger a duty to use the highest degree of care for his protection and safety consistent with the reasonable operation of its business; that this high degree of care should be exercised by defendant from the time that the passenger in good faith enters into the buildings, platforms and premises of the defendant for the purpose of entering said cars as a passenger, and which duty also includes a high degree of care to keep the platforms in a safe condition, keep them lighted when necessary, provide means of signaling a car when necessary and to run

its car at and by said station in such a manner as to observe a very high degree of care for the protection and safety of such passengers."

As to this instruction, defendant's counsel say in their brief:

"By this paragraph of the charge it is assumed that the plaintiff was a passenger, while in other paragraphs of the charge it is stated that he is not a passenger unless the jury believe that he signaled the car as testified to, and that the motorman answered the signal by two short blasts of the whistle. One or the other is erroneous.

"This place where the accident occurred was merely at a country crossing; there was no agent there; no tickets sold; no heat provided; merely a shelter where passengers might wait before signaling a car. No one would contend that plaintiff when he appeared there became a passenger before he signaled a car. We submit, that he does not become a passenger then. But assuming, for argument's sake, that he does, this was a question for the jury. The motorman had testified that he gave no signal, and none of the other witnesses heard the two short blasts of the whistle. Yet, paragraph 13, of the charge, presupposes that defendant had accepted him, and lays down a rule as to the duty."

They concede that in other portions of the charge the court properly instructed the jury as to the duty the defendant owed plaintiff as an intended passenger and that he only became such in case the jury found that he had given the necessary signal and the motorman had answered in the usual way. They insist, however, that under the rule many times stated by this court—

"Where a charge contains two conflicting portions, one of which is correct and the other incorrect, it will be presumed on appeal that the jury followed the erroneous portion." *Bayne v. Everham*, 197 Mich. 181.

See, also, *Rathbone v. Railway*, 187 Mich. 586.

While the language employed was unfortunate, we cannot believe, in view of the other portions of the charge, that the jury could have been in any way influenced by it. It did not instruct them that the plaintiff was a passenger. It in no way applied the instruction to the particular facts, but stated a somewhat broad proposition of law applicable to such cases. Besides the rule above stated on which defendant relies, it has also been said:

"This court has frequently laid down the rule that the charge of a trial court to the jury in a given case should be considered as a whole, and that the portion objected to should be read and considered in connection with all other portions of the charge given bearing upon the same subject." *Marshall v. Railroad Co.*, 184 Mich. 601.

The other errors complained of relate to the refusal of the court to give certain requests proffered by defendant. While they might well have been given, they merely stated negative propositions and their force and effect were fairly covered in the charge as given.

4. Argument of plaintiff's counsel. The argument of both of plaintiff's counsel is inserted in full in the record. As is not unusual in such cases, there was much said by them which should have been omitted. It is apparent that at the time of the argument the court had not intimated to counsel the manner in which he would submit plaintiff's claim to the jury. They were thus required to anticipate his instructions, and consequently discussed matters which under the charge as given were not to be considered by the jury. We must assume that the members of the jury were intelligent men; bent on deciding the case fairly between the parties; that they realized it was their duty to be governed by the instruction of the court as to the

law, and not by the argument of counsel. Without alluding to the particular errors pointed out, we are of opinion that the jury were not improperly influenced or swayed to defendant's prejudice by such arguments.

5. Weight of the evidence. Should a new trial have been granted to defendant because the verdict was contrary to the weight of the evidence? This question having been properly raised on the motion for a new trial, it becomes our duty to examine the testimony to determine whether or not the verdict is so overwhelmingly against the weight of the evidence as, in justice to the defendant, to call for a new trial. *In re McIntyre's Estate*, 160 Mich. 117.

The plaintiff's testimony as to the cause of his injury was uncorroborated except as the surroundings may have given it support. Uncontradicted, it would not, in our opinion, appear unreasonable or even improbable. His right of recovery depended upon his establishing the fact that he had given the signal and that it was responded to by the motorman. He was at the flag station to take the car, and knew he must signal to have it stop. While contradicted by the motorman and by Conductor Southwell as to the answering signal having been given, if but this testimony be considered we would find no justification for disturbing the verdict for that reason.

It is insisted that plaintiff's testimony as to the manner in which he sustained his injuries is so flatly contradicted by the statements he made soon after the occurrence as should have caused the jury to disregard it or, in any event, should entitle defendant to a new trial. It is claimed that such statements should be taken as admissions on his part and that they clearly show that his injury was caused by his right arm having been struck by the car.

We have made a careful examination of the testi-

mony relied on to support this claim. Dr. Hume, who was on the car at the time of plaintiff's injury, testified on cross-examination by defendant's counsel as follows:

"Q. He told you he was signaling the car with his right arm—hand, didn't he?

"A. I wouldn't say positively that he said that, but my recollection is that he told me he was signaling the car. Now, he might have said with his right hand. I wouldn't swear positively."

Dr. Arnold, a surgeon employed by the defendant, who assisted Dr. Hume in reducing the fractures in plaintiff's arm and leg, was called by plaintiff to testify to his injuries. On cross-examination by defendant's counsel, he said:

"Q. And did you ask him what had happened, how the accident had occurred, or did he tell you?

"A. Yes, we talked it over in a way.

"Q. Did he tell you he was standing on the platform and attempted to flag a car by waving his right hand and that he misjudged the distance of the car and the car struck his right arm, whirling him around?

"A. I don't know as he specified his right arm, but he was flagging—the impression I got from his conversation was, he was flagging the car.

"Q. Yes.

"A. And the car struck his arm.

"Q. The car struck his arm?

"A. And whirled him around."

He was afterwards shown a report he had made to the company, and, after refreshing his recollection by reading it, he was asked:

"Q. What will you say whether or not he told you he was signaling with his right or left arm?

"A. Well, with his right arm.

"Q. Right arm? And that he misjudged the distance and the car struck his right arm?

"A. That was my impression."

Benjamin Kleinstiver, the claim agent of the de-

fendant, went with Dr. Arnold to plaintiff's home on the 20th, four days after his injury. He testified that while there, and after the doctor had left, the plaintiff told him that he signaled the car to stop with his right arm and that it was hit by the car. On cross-examination by plaintiff's counsel, he said:

"I wouldn't say which it was, right arm or hand, that he said which it was, either the right arm or hand. But the right arm was broken and he was whirled around and was thrown to the platform, or onto the platform, and he couldn't tell how or in what manner his left leg or foot was injured. He also told me that when the car was about 40 rods away, he began to signal; that the headlight was burning, and burning bright. As I recall it, he said he commenced to signal about 40 rods; he thought the car was about 40 rods away."

The deposition of Robert W. Bell, of Columbus, Ohio, who was on the car, had been taken. In it he testified:

"The injured man stated that when the car came along he stepped out from the little storm building there that they might see him, and when he found they were not going to see him, why he attempted to touch the car with his medicine case, and he expects he must have got a little nearer than he thought he was, and the car hit him on the arm and knocked him off the platform, or pushed him off the platform—he didn't know just how he got in that position, or how he fell that his leg got under him. I do not know how his arm was hurt. When the injured man made these statements there were two men, another doctor, and two ladies and myself present."

He further said that the car approached the station at the rate of 8 or 10 miles an hour, and that it was stopped within 75 yards of the station.

The other three witnesses, whom defendant relies on, all of whom were on the car, testified that the plaintiff said "he didn't think the car was so close to him."

It may be observed that the witness Kleinstiver was contradicted by plaintiff and his wife and his daughter, all of whom testified that no such statement was made while the witness was at plaintiff's home. Mr. Bell's recollection differs from that of all others on the facts. It is significant that he estimated the speed at which the car was running at 8 or 10 miles an hour while the motorman believed that he was running 45, and that, in his judgment, the car stopped within 225 feet while the motorman fixed the distance at 800 or 900 feet.

A fair consideration of all this testimony does not, in our opinion, require us to overrule the finding of the jury as to the weight of the evidence. It is not suggested that plaintiff voluntarily placed himself in a position of danger. This car, running at 45 miles per hour, would, as before stated, travel more than 65 feet per second. If the plaintiff had a right to expect it to stop, the time which would elapse between his discovery that it would not and its passing the plaintiff would be brief indeed; and his recollection of what he did in that time might well be hazy and imperfect. As the only purpose of this contradictory evidence is to show admissions on plaintiff's part as to where he was and what he did at the precise moment the car passed, we do not feel that it so affects the real question at issue as to entitle defendant to a new trial for the reason claimed.

Was the verdict rendered excessive? The injuries sustained by plaintiff were serious and painful. He was confined to his bed for 8 weeks. After a time he was able to go about on crutches, but was unable to resume his practice for 8½ months. His right forearm was fractured, both bones having been broken, and his right wrist partly stiffened so as to greatly impair the use of his arm. Both bones of the left

leg, near the ankle, were fractured. This joint is stiffened, and will always remain so. The leg is shortened about one and one-half inches. The surgeons who examined plaintiff agree that his injuries are permanent and much impair his usefulness in the practice of his profession. He is now, and always will be, unable to do any surgical work. Plaintiff was 52 years of age at the time of his injuries. His income from his practice at that time was more than \$300 per month. Under these facts, which are not in dispute, we do not feel called upon to interfere with the judgment of the jury as to the damages to which they found him entitled.

After a careful reading of the entire record, and giving due consideration to the several assignments of error alleged by defendant, we are constrained to hold that this case was fairly tried and that there was sufficient evidence sustaining the burden of proof assumed by plaintiff on the issues presented to justify the verdict of the jury.

The judgment is, therefore, affirmed, with costs to plaintiff.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

GAGUSH v. HOEFT.

1. TRIAL—CONDUCT OF COUNSEL—INSTRUCTIONS—SAVING QUESTIONS FOR REVIEW.

A remark by counsel for plaintiff that he would stipulate that witness for defendant, who was with difficulty giving testimony through an interpreter, would say what counsel for defendant wanted her to say, where, upon objection, the trial judge instructed the jury to pay no attention to the remark, in view of uncertainty in the appellate court as to the intended and accepted meaning of the remark, and the manner in which it was treated by the trial judge, *held*, not reversible error.

2. APPEAL AND ERROR—ARGUMENT OF COUNSEL—INSTRUCTIONS—TRIAL.

In an action for breach of marriage promise, where counsel for plaintiff, in his argument as to the measure of damages, said "She is entitled to the same share in his property"—when he was interrupted and the judge stated that he would attempt to define the measure of damages when he got to it, and no complaint is made of the charge of the court thereafter given, there was no reversible error, although counsel finished his remarks as to his understanding of the measure of damages, stating that if he was wrong he would stand corrected.

3. TRIAL—ARGUMENT OF COUNSEL—OPINION BASED ON TESTIMONY.

In an action for breach of marriage promise, where plaintiff's damages were aggravated by her seduction, her counsel did not exceed the limits of proper argument in stating to the jury that he was impressed, and that he thought the jury ought to be, that upon the record plaintiff was shown to be a virtuous woman, where his expressed opinion was based upon testimony.

4. SAME

It was error for the court to refuse to counsel the right to comment in his argument upon certain alleged contradictions in the testimony given upon the former and upon this trial without producing a transcript of the testimony

given upon the last trial or having the reporter read what was desired from his notes.

5. APPEAL AND ERROR—ARGUMENT OF COUNSEL—LIMITING ARGUMENT.

Error in limiting the argument of counsel, where prejudice did not result, *held*, not reversible.

ON REHEARING.

1. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error to the charge of the court without pointing out any specific erroneous statement therein, *held*, not sufficiently specific.

2. TRIAL—ARGUMENT OF COUNSEL—BASED ON TESTIMONY.

The argument to the jury should be based on the testimony submitted at the trial.

3. SAME—RIGHT TO COMMENT ON CONTRADICTORY TESTIMONY GIVEN AT FORMER TRIAL.

Counsel had the right during the new trial to interrogate witnesses as to the testimony given by them on the former trial, either from a transcript of such testimony, or from notes taken by him, or from his personal recollection of what they then testified to, and if the witnesses admitted the giving of such testimony and it is contradictory, counsel may comment on it in his argument to the jury without producing a transcript, or he may submit to the jury his recollection of the questions asked and answers given, and he should not be prevented from doing so, unless on objection, the trial judge is convinced that counsel is mistaken in his statement of such testimony.

4. APPEAL AND ERROR—COMMENT ON CONTRADICTORY STATEMENTS NOT IN RECORD.

Counsel cannot complain of not having been permitted to comment on contradictory statements of witness on the former trial, where he neglected to call her attention to them when she was on the stand.

5. SAME—ERRORS APPEARING IN RECORD.

The Supreme Court can only consider the errors which appear on the printed record.

6. SAME—CONDUCT OF COURT—PREJUDICE.

Alleged error in the use of the word "rebuke" by the trial judge when commenting on the contradictory nature of the testimony, where not alluded to in the brief, *held*, not prejudicial in view of the fact that the verdict was less than on the former trial.

Error to Wayne; Webster (Clyde I.), J. Submitted February 5, 1919. (Docket No. 18.) Decided April 3, 1919. Resubmitted October 7, 1919. Former opinion affirmed December 22, 1919.

Case by Anna Gagush against William Hoeft for breach of promise of marriage accompanied by seduction. Judgment for plaintiff. Defendant brings error. Affirmed.

Peter P. Boyle (McHugh & Lee, of counsel), for appellant.

Harold McIntyre, for appellee.

OSTRANDER, J. A judgment for \$2,000 for plaintiff was reversed and a new trial ordered. *Gagush v. Hoeft*, 198 Mich. 263. The testimony, which it was held required the giving of a certain refused instruction, does not appear at all in the record now before us, about which appellant does not complain, did not seek to develop on cross-examination or otherwise, and about which counsel for appellee says in the brief:

"While the general facts and theories as reported and developed in the former trial of the circuit court were again reiterated, certain material evidence which was introduced at the trial of the cause the first time were entirely omitted, changed, amended on this last trial."

The case for the plaintiff is, however, so developed in the statement of facts in the 198th Michigan that it is not necessary to repeat that statement here.

Upon the second trial, plaintiff had judgment for

\$1,850. Appellant's assignments of error, argued in his brief, are based upon exceptions to rulings made during the course of the trial and upon exceptions to alleged prejudicial remarks of counsel for appellee. These various exceptions brought to the attention of the court upon a motion for a new trial were overruled, and of 37 assigned errors only the 9th, 26th to 30th inclusive, and the 37th are referred to in the brief. These assignments will be referred to in their order.

A witness was giving testimony, an interpreter being employed. Difficulty appears to have been experienced in eliciting whatever the woman knew. It is not apparent that this difficulty arose from the fault of any one. A question was propounded. The court said:

"Now, interpreter, have her understand that, what Mr. McHugh (counsel for defendant) wants is to have her tell what Mrs. Gagush said as to what took place in the cemetery, see if you can have her understand that.

"A. First, she did not tell until afterwards.

"Q. Then what did she tell you afterwards?

"Mr. McIntyre (attorney for plaintiff): I will stipulate, your honor, on this record that this witness will say what he wants her to say."

Counsel for defendant objected to this as a grossly prejudicial remark and recorded an exception, and the court said:

"The exception may be noted. The jury should not pay any attention to that. We are all having trouble getting these questions and answers, and it is not the fault of anybody."

We are not at all certain that the counsel who made the remark complained about intended the meaning to be given to it which counsel for appellant gives it, which is a meaning that the words, standing alone, import. Our uncertainty as to the intended and ac-

cepted meaning of the remark arises partly from the manner in which the objection was treated by the trial court. If the attorney who made the remark intended that the jury should understand him to assert that the witness would, without regard to truth, give such testimony as the defendant wished her to give, he deserved a reprimand from the court which would sharply correct his conduct. Whatever his intended meaning, the remark should not have been made. It does not follow that defendant was prejudiced by it. Jurors do not generally overlook the lack of due decorum on the part of counsel in the trial of causes, and are quite likely to resent improper and impertinent remarks and comments. The testimony of this witness, as well as her manner of giving it, was for their consideration. We cannot say that reversible error was committed.

In his argument to the jury, addressed to the question of damages, the attorney for appellee said, "She is entitled to the same share in his property—," when he was interrupted by the objection that the measure of damages is not determined "by any share in his property." The court said, "I will attempt to define the measure of damages to the jury when I get to it." The attorney for appellee at once disclaimed the right or desire to usurp the functions of the court, but continued, by saying:

"I am simply telling you, if I be wrong in my statement of what the measure of damages in this case is, then I will stand corrected, but my understanding is, gentlemen, if this woman promised to marry a man that was worth \$5,000, and as his wife she would become entitled to an interest in that \$5,000, if he were to die the next day after the marriage ceremony were performed, she would be entitled to dower rights in his property."

No complaint is made of the charge of the court thereafter given. A party is more often harmed than

aided when his counsel asserts a legal proposition which the court denies.

Continuing his argument, counsel for appellee became eloquent and was several times interrupted and exceptions were taken to his remarks. Without setting out the argument, we express the opinion that the limits of proper argument were not exceeded. Counsel did express the opinion that his client was a virtuous woman. Her reputation for chastity was involved by the testimony. His expressed opinion seems to have been based upon the testimony. Summed up, his expressions in his argument amounted to no more than this: "I am impressed, and I think the jury ought to be, that upon this record she is shown to be a virtuous woman."

It was error for the court to refuse to counsel for the appellant the right to comment in his argument upon certain alleged contradictions in the testimony given upon the former and upon this trial. Using the testimony given on the former trial, counsel had properly interrogated the witnesses for appellee upon cross-examination, and had secured certain admissions with respect thereto. In argument, he sought to return to the matter and to call the attention of the jury to the alleged discrepancies and contradictions of testimony. For this purpose he used, as he had used in interrogating the witness, the record of the testimony given on the first trial. This he was refused permission to do. No one claimed, or now claims, that he made improper use of the testimony or sought to call attention to matter not used in cross-examining the witnesses. What he sought to do was, in substance and effect, this: To say to the jury that the witness admitted having testified on the former trial as follows—reading from the minutes of the testimony given on the former trial matter to which the attention of the witness had been directed—and upon this trial she testi-

fied differently. In short, he was directing attention to testimony given at the instant trial. But the court was of opinion that he should either have produced a transcript of the testimony given upon the last trial or have had the reporter read whatever was desired from his notes. The practice pursued by counsel is not an uncommon one, and not improper, it being always the duty of the trial court to see that an unfair argument is not indulged in. Whether for this error, this limiting of the privilege of argument, the judgment should be reversed depends upon whether we can say that prejudice did not result. To this end we have examined the testimony, and especially the alleged contradictory statements of witnesses about which counsel sought to address the jury, reaching the conclusion that it is wholly improbable that the limitation of the argument affected in any way the result—the conclusion of the jury. Wholly outside of the alleged contradictory statements of the witness, there remains the main, the vital and material facts upon which plaintiff's case depended. They were, that the parties mutually promised to marry each other, at a time to be fixed and which was fixed, reasonably, by defendant, that the defendant refused to marry plaintiff, that her damages were aggravated by her seduction by defendant under promise of marriage.

We do not find reversible error, and therefore affirm the judgment, with costs to appellee. .

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

ON REHEARING.

SHARPE, J. 1. In considering appellant's claim that the jury were prejudiced by the remarks of plaintiff's counsel as to the damages to which she would be entitled, Mr. Justice OSTRANDER, who wrote the opinion, said:

"No complaint is made of the charge of the court thereafter given. A party is more often harmed than aided when his counsel asserts a legal proposition which the court denies."

It is claimed that he overlooked the fact that error was alleged on the charge as given relative to the measure of damages. While it is true that error was so alleged, counsel then failed, and now fail, to point out any specific erroneous statement therein. As we read it, we think it fairly stated the matters which the jury should consider in assessing plaintiff's damages. *Bennett v. Beam*, 42 Mich. 346.

2. In the opinion filed it was said:

"It was error for the court to refuse to counsel for the appellant the right to comment in his argument upon certain alleged contradictions in the testimony given upon the former and upon this trial."

The conclusion was reached after examining the testimony, and especially the alleged contradictory statements of witnesses, that—

"It is wholly improbable that the limitation of the argument affected in any way the result."

The argument to the jury should be based on the testimony submitted at the trial. Counsel had the right during such trial to interrogate witnesses as to the testimony given by them on the former trial, either from a transcript of such testimony, or from notes taken by him, or from his personal recollection of what they then testified to. If the witnesses admitted the giving of such testimony and it is contradictory, counsel may comment on it in his argument to the jury. He need not produce a transcript of the testimony taken while the trial is in progress to entitle him to do so. He may submit to the jury his recollection of the questions asked and answers given, and he should not be prevented from doing so, unless, on

objection, the trial judge is convinced that counsel is mistaken in his statement of such testimony.

The alleged erroneous ruling occurred during the argument of defendant's counsel to the jury. We quote from the record:

"Mr. McHugh: Now in the first trial the same witness was questioned upon that subject and this is what she said: 'Q. I went there'—that is on direct examination now by her own counsel, she was not being cross-examined, she was not annoyed or heckled by opposing counsel, but was being questioned in a nice, kind way by her own mother's attorney and this is what she says, page 85:

"The Court: Is that in the record in this case?

"Mr. McHugh: Yes, your honor, it was called to the witness' attention and read to her."

On objection, and after some discussion, counsel assured the court that "these identical questions were asked of the witness when she was on the witness stand." Whereupon the court ruled that he might proceed.

We have examined the printed record with care and cannot find that any such question as counsel was seeking to read to the jury appears therein.

Later in counsel's argument, the record shows:

"Mr. McHugh: First we find that Mrs. Gagush testified that she put the children to bed on the 13th of July; you will remember she claimed that Mr. Hoeft came to her home and that she left him and went in and put the children to bed, and upon that subject she was questioned along these lines: 'Q. When did they go to bed? A. Half-past nine.'"

Upon objection being made, defendant's counsel said: "I submit, your honor, it was called to the witness's attention." The court expressed a clear recollection that no such question was put to the witness on the trial and ruled that counsel could not read from the transcript of the former trial.

A careful examination of the record shows that the court was right and counsel mistaken. Unless much care be exercised in marking the passages in the transcript of the testimony given on a former trial, counsel may mark parts thereof which he intends to ask the witness concerning but fails to do so. This, apparently, is what occurred. But he cannot now complain of not having been permitted to comment on contradictory statements which do not appear in the present record.

In defendant's brief now filed, several pages consist of parallel columns claimed to be statements made by plaintiff and several other witnesses on the present trial contradictory to those given on the former trial. For the purpose of the comparison, the record of the former trial and in one case the stenographer's minutes are quoted from. We can only consider the errors which appear on the printed record before us. From it we reach the conclusion that no prejudicial error was committed by the trial court in the rulings complained of.

3. Defendant's counsel insist that this court overlooked his claim of error in the trial judge using the word "rebuke" when commenting on the contradictory nature of the testimony and that the jury were influenced thereby in their allowance of damages to plaintiff. It is, perhaps, sufficient to say that this alleged error was not in any way alluded to in the brief filed by defendant, but, in view of the fact that the verdict at the last trial was less than that rendered at the former trial, it seems apparent that no prejudice was created thereby.

The judgment must stand affirmed, with costs to plaintiff.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

DOW CHEMICAL CO. v. DETROIT CHEMICAL WORKS.

1. SALES—DELIVERY TO CARRIER—PASSING OF TITLE.

In the sale of goods the general rule that title passes when the vendor has fully performed in the appropriation and delivery of the goods to the vendee, and delivery to a public carrier for transportation constitutes delivery to the vendee, has been adhered to in this State, and is, in effect, incorporated in the uniform sales act (3 Comp. Laws 1915, §§ 11849, 11850, 11873, 11877).

2. SAME—RIGHT TO REJECT AFTER ACCEPTANCE.

Title may pass even though the right to reject after acceptance be reserved.

3. SAME—PLACE OF DELIVERY.

A provision in a contract for the sale of 900 tons of sulphuric acid to be delivered in monthly installments providing that the price should be "\$12 per ton f. o. b. vendor's tank cars, Detroit, Mich., less freight to Midland, Mich.," construed, and held, that place of delivery was at Detroit, although the buyer had the right to deduct the freight to Midland.

4. SAME—DELIVERY—TIME OF PAYMENT.

In view of section 42 of the uniform sales act (3 Comp. Laws 1915, § 11873) fixing the time of payment concurrent with delivery unless otherwise provided, where the contract provided payment to be "net cash in ten days," payment was due ten days from delivery of each installment at Detroit.

5. SAME—CANCELLATION OF CONTRACT—DEFAULT.

Where the contract gave the vendor the option, in case the buyer failed to make payment according to its terms, to delay further shipment until payment was made or cancel the contract, the vendor had the right, when the buyer failed to make payment within ten days of delivery at Detroit, to cancel the contract.

6. WAIVER—NOTICE—INTENT.

Waiver implies the abandonment of a right by a person entitled to exercise it, who has at the time full knowledge

of the existence of the fact on which the right depends, and such knowledge and the intention to relinquish the right must concur.

7. SAME—DEFAULT—NOTICE.

Although, under the contract, payment for an installment became due on February 1st and vendor made another shipment on February 3d, without having received payment for previous shipment, said action cannot be said to be a waiver of its right to rescind, since payment might have been in the mails, and vendor, at the time of the alleged waiver, had no definite knowledge of the default.

8. SALES—SHIPMENT IN INSTALLMENTS—DEFAULT.

Although the contract provided for approximately equal monthly shipments, where first shipment was made on January 22d in response to buyer's notification on January 20th, and second shipment for that month was made on February 3d, *held*, that the vendor was not in default in not making shipment of second installment in January.

Error to Wayne; Webster (Clyde I.), J. Submitted June 10, 1919. (Docket No. 100.) Decided December 22, 1919. Rehearing denied June 17, 1920.

Assumpsit by the Dow Chemical Company against the Detroit Chemical Works for breach of a contract of sale. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Beaumont, Smith & Harris and *G. A. Currie*, for appellant.

Monaghan, Monaghan, O'Brien & Crowley, for appellee.

FELLOWS, J. On June 8, 1915, the parties hereto entered into the written contract following:

"The Detroit Chemical Works of Detroit, Michigan, vendor, agrees to sell and deliver to the Dow Chemical Company of Midland, Michigan, purchaser, and the said purchaser agrees to buy, receive and pay for the

merchandise hereinbelow described, in the quantities and at the prices herein named, during the period of one year from January 1st, 1916, and according to the terms and conditions named below:

"Description and Quantity:

"Nine hundred (900) net tons (2000 lbs.) of sulphuric acid commercial grade of approximately 60° Be. Strength.

"Prices:

"Twelve dollars (\$12.00) per ton, f. o. b. vendor's tank cars, Detroit, Michigan, less freight to Midland, Michigan, all deliveries to be computed to and billed as 60° Be.

"Deliveries:

"To be made and taken in approximately equal quantities throughout the months of 1916—as nearly as may be 75 tons per month.

"Terms of Payment:

"Net cash in 10 days.

"Conditions:

"Each shipment to be treated for the purpose of settlement, as a separate and independent sale, but if buyer fails to make payment for any materials furnished by vendor according to terms of sale, said vendor may defer additional shipments until payment is made, or may cancel this contract at his option.

"Payment of all bills to be made in United States gold coin or its equivalent in United States currency. The vendor reserves the right to decline to make deliveries on this contract except for cash, whenever said vendor shall have any doubt as to buyer's responsibility and so informs buyer. Deliveries to be renewed according to contract terms when buyer shall have satisfied said vendor as to his responsibility.

"It is understood and agreed that any decline or advance in freight rates or other transportation charges which may be made subsequent to date of this contract shall be for the account of and borne by the buyers.

"Vendor shall not be held responsible for failure of delivery when same is due to strikes, fire, casualties at their works, delays in transit, or other contingencies beyond their control.

"This contract agreed to as above."

The acid under this contract was to be delivered during the year 1916. On January 20, 1916, plaintiff wrote defendant referring thereto:

"There is due on our contract 75 tons of 60° acid this month. This is approximately two cars. Please make shipments about three or four days apart."

On January 22d, defendant replied thereto:

"We are shipping you one car today, in compliance with your request, and a second car will follow the latter part of next week, which we trust will be satisfactory."

The first car was shipped and invoiced as of that day. It contained 62,500 pounds of acid testing 59.58, being the equivalent of 61,930 pounds of 60° acid. It was billed at the contract price of \$12 per ton, less the freight to Midland of .104 per cwt., making a net of \$306.58. The invoice reached plaintiff on January 27th. The car did not arrive in Midland until the 29th (Saturday), about 4 p. m. It was delivered at plaintiff's plant on the 31st. On February 3d, plaintiff wrote defendant:

"Please rush shipment of the balance of sulphuric acid due on our contract for shipment during January. Also get the February quota out for us. These cars may be distributed approximately in even shipments over this month."

On that day, and before receiving plaintiff's letter, defendant had shipped the second car. It was billed out as of February 3d, and contained 61,960 pounds of 60° acid. The invoice price, after deducting freight, was \$307.32. This car reached Midland on February 8th. It was not received by plaintiff until the 19th. This was considered by both parties as in fulfillment of the January quota.

On February 7th, defendant's treasurer dictated a letter to plaintiff, which was, however, not mailed until the 9th. It reads as follows:

"Owing to the fact that you seem determined to ignore the terms of our contract with you for 60° sulphuric acid, we now elect, under the terms of said contract, to declare same canceled.

"Our invoice to you of January 22d, for delivery of the first car of sulphuric acid, under this contract, matured on the 1st. Up to this writing we have not received remittance for same.

"On December 8th last, we wrote you at some length on this very subject, calling your attention to the fact that you were endangering your contract by your non-observance of the terms thereof.

"We will, therefore, now cancel this contract.

"Trusting you will see the justice of our position, we remain."

This reached plaintiff on the 10th, and on the same day plaintiff's agent went to Detroit and paid defendant for the first car shipped. On February 12th, plaintiff paid defendant for the second car shipped. The defendant refused to make further shipments as requested by plaintiff, claiming that it had canceled the contract by its letter of February 7th, and that it had the right to do so. Plaintiff was compelled to buy acid in the open market, and in this suit seeks to recover the damage it sustained by reason of the failure of defendant to furnish the acid according to the contract.

It is plaintiff's claim that it was not required to pay for the acid, according to the terms of the contract, until 10 days after its delivery to it at Midland and a reasonable time allowed for the inspection thereof. It also claims that by making the shipment on February 3d, defendant waived the default of plaintiff in not having paid for the car shipped within 10 days after January 22d, and that it thereby became estopped from cancelling the contract as it did on February 7th.

The court, over plaintiff's objection, permitted de-

fendant to offer proof tending to show a general custom of the trade by which the language of the contract, "Terms of payment: Net cash in 10 days," was construed to mean, payable in cash within 10 days after date of invoice or shipment. There are other facts which will be stated in the discussion of the questions presented.

After the proofs were concluded, the trial judge directed a verdict for the defendant, holding that it was justified in terminating the contract for the reason stated, and that there was no waiver of its terms which prevented it from relying on such cancellation as a defense in this suit. From a judgment for defendant entered on such verdict, the plaintiff appeals.

There are many assignments of error relating to the admission and rejection of testimony and to the rulings of the court, but the meritorious question presented is as to the action of the court in directing a verdict for defendant. As stated in plaintiff's supplemental brief:

"The two major questions in this case are (1) When was the payment due of the invoice of January 22, 1916? and (2) If the right to cancel the contract accrued to the defendant by reason of the delay in the payment of this invoice, did the defendant by its conduct waive that right."

The following sections of our uniform sales act, 3 Comp. Laws 1915, § 11832 *et seq.* (Act No. 100, Public Acts 1913), are pertinent and controlling so far as they apply:

"(11849) SEC. 18. Property in specific goods passes when parties so intend.

"(1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

"(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the

contract, the conduct of the parties, usages of trade and the circumstances of the case.

"(11850) SEC. 19. Rules for ascertaining intention. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

"Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

"Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them in a deliverable state, the property does not pass until such thing be done."

"Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

"(11873) SEC. 42. Delivery and payment are concurrent conditions. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods."

"(11877) SEC. 46. Delivery to a carrier on behalf of the buyer.

"(1) Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section nineteen, rule five, or unless a contrary intent appears."

1. When was the payment due? The terms of pay-

ment agreed upon were: "Net cash in 10 days." "Net cash," of course, means cash without the allowance of any discount. The cash was to be payable in 10 days. When shall these days be counted from? The plaintiff contends from the date of the delivery of the acid to it and its acceptance after test and inspection at Midland. The defendant insists, from the date of delivery on board its tank car at Detroit and the consignment of the car to plaintiff. Quoting from plaintiff's brief:

"'Net cash' means cash on delivery. Then, 'Net cash in 10 days' means 10 days from delivery and such reasonable time to inspect."

There is much discussion by counsel as to when title to the acid passed to the plaintiff. While not conceding that the determination of this question is controlling, plaintiff's counsel contend:

"The title does not pass until such delivery and inspection and a reasonable time therefor."

The general rule is that title passes when the vendor has fully performed in the appropriation and delivery of the goods to the vendee, and delivery to a public carrier for transportation constitutes delivery to the vendee. There may, of course, be stipulations in the contract or circumstances attending its performance which indicate a contrary intention. *Wagar v. Railroad Co.*, 79 Mich. 648. This rule is, in effect, incorporated in the sections of the uniform sales act above quoted.

It is claimed by plaintiff that as the acid was to be of a particular commercial grade and strength, it necessarily had the right to inspect before acceptance and that title did not pass until such inspection and acceptance had been had. The argument based on this claim loses sight of the fact that title may pass even though the right to reject after acceptance be reserved.

The general rule above stated seems to have been adhered to many times by this court. Perhaps the leading case, and that which best exemplifies the rule, is *Kuppenheimer v. Wertheimer*, 107 Mich. 77 (61 Am. St. Rep. 317). The plaintiffs were wholesale clothing dealers in Chicago and shipped certain goods to defendant, a retail dealer in Detroit, on an order given from samples. The right to inspect was expressly agreed upon. Plaintiffs contended that delivery to the carrier completed the sale and passed title to defendant, while defendant claimed that the delivery to the carrier was merely for transportation and that title to him did not pass until he had received the goods and made inspection thereof. After announcing the general rule above stated, the court said:

"In the present case there is no evidence of an understanding that the property should not pass until inspected. Nothing was said about transporting to Detroit with a view to change of ownership only after acceptance. It is true that the goods were to be examined, and the price remitted at once, if found correct; but the agreement was silent as to this inspection being with a view to a change of ownership. The right to inspect before acceptance always exists, and a purchaser cannot be required to inspect at the shipping point, but is entitled to a reasonable opportunity after the arrival of the goods. *Fogel v. Brubaker*, 122 Pa. St. 7 [15 Atl. 692]; 2 Benj. Sales (Corbin's Ed.), §§ 910, 966; *Erwin v. Harris*, 87 Ga. 333 [13 S. E. 513]. If the goods are not up to the sample, the right to refuse them exists, which is, in effect, a rescission. The title passes upon delivery to the carrier, subject to this right, of which the purchaser may avail himself or not. Upon the facts shown, the court properly held that title passed by delivery to the carrier."

This decision has been cited and approved in *People v. Sheehan*, 118 Mich. 539; *Althouse v. McMillan*, 132 Mich. 145.

The application of this rule in no way deprived plaintiff of its right of inspection after the arrival of the car. In *Williston on Sales*, § 473, page 830, it is said:

"Where by the terms of the bargain the property was to pass before delivery to the buyer, the buyer has a reasonable time after delivery in which to examine the goods, and if they are not of a kind and quality ordered, he may then refuse to accept them, and thereby rescind the contract; but this does not prevent the title from passing, nor a recovery by the seller in an action for goods sold and delivered if in fact they do conform to the terms of the contract."

See, also, *Meagher v. Cowing*, 149 Mich. 416; *Illinois Glass Co. v. Horse-Radish Co.*, 166 Mich. 520; *Germain v. Loud*, 189 Mich. 38.

Is the rule thus announced and followed by this court in any way abrogated by the provisions of the uniform sales act above quoted? Rule 2 of section 19 provides, in effect, that the title shall not be deemed to have passed while "the seller is bound to do something to the goods, for the purpose of putting them in a deliverable state."

There can be no claim that this rule applies as the acid was in condition for use when shipped. Rule 5 of the same section reads:

"If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

The contract provides that the price shall be—

"Twelve dollars (\$12.00) per ton, f. o. b. vendor's tank cars, Detroit, Michigan, less freight to Midland, Michigan."

Does this provision, which permits the plaintiff to deduct the freight to Midland, bring the shipment

within the above rule? We do not think the language used should be construed as an undertaking on the part of the defendant to deliver the product at Midland. While the plaintiff had the right to deduct the freight rate from Detroit to Midland, as counsel for the defendant pertinently suggest, plaintiff could have ordered this car sent to any point designated and, no matter where sent, to deduct the Midland rate of freight. The provision is specific that delivery shall be on defendant's tank cars at Detroit, and this was in no way controlled by defendant's agreeing that plaintiff might deduct the freight cost of transportation to Midland. Had plaintiff's necessities at some time required that a car go forward by express, there can be no claim that it would have had any right to deduct more than the usual freight charges. This construction is accentuated by the provision in the contract that—

“any decline or advance in freight rates or other transportation charges which may be made subsequent to date of this contract shall be for the account of and borne by the buyers.”

See, also, Williston on Sales, § 280.

We must therefore conclude that delivery was made and that the title to the acid passed to the plaintiff when placed in its car and consigned for transportation to plaintiff at Midland. Section 46 (above quoted) so provides.

Delivery having been made to plaintiff at Detroit, the time of payment is fixed by section 42, wherein it is said that—

“Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions.”

We therefore find that the invoice was payable in 10 days from the date of delivery, January 22d.

Was plaintiff's failure to make payment within 10 days thereafter such a breach as entitled defendant

to cancel the contract? Section 45 of the uniform sales act provides:

“(11876) SEC. 45. Delivery in installments.

“(1) Unless otherwise agreed the buyer of the goods is not bound to accept delivery thereof by installments.

“(2) Where there is a contract to sell goods to be delivered by stated installments which are to be separately paid for, and the seller makes defective deliveries in respect to one or more installments, or the buyer neglects or refuses to take delivery of or pay for one or more installments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.”

The contract between the parties provides:

“Each shipment to be treated for the purpose of settlement, as a separate and independent sale, but if buyer fails to make payment for any materials furnished by vendor according to terms of sale, said vendor may defer additional shipments until payment is made, or may cancel this contract at his option.”

The plain language of this provision gives the defendant the option when the buyer fails to make payment according to the terms of sale to delay further shipment until payment is made or cancel the contract. It exercised the option to cancel. Plaintiff's counsel in their brief say:

“The contract was for delivery in monthly installments, payments to be likewise made in installments. The failure to pay for one installment is not of itself such a breach as to justify, by the seller, a refusal to proceed further. A failure to pay sufficient to justify such cancellation must amount to a material breach of the contract. The determination of whether the failure to pay is such a material breach, ‘depends on the

terms of the contract and the circumstances of the case' and is a question of fact."

They rely on the quotation from section 45. This section and the effect to be given to this language were considered by this court in *Cadillac Machine Co. v. Iron Co.*, 205 Mich. 107. In that case, the provisions relative to cancellation read:

"If the buyer fails to make payment when due, the seller shall have the right to cancel the contract or to postpone shipments of future installments until prior shipments are paid for."

In the opinion, also very illuminating on some of the other questions discussed, Mr. Justice BROOKE, speaking for the court, said:

"It is further urged that this being a sale of goods by installment the seller cannot rescind or refuse performance unless the buyer's default is made under such circumstances as justifies an inference that he repudiates the entire contract, citing *West v. Bechtel*, 125 Mich. 144 (51 L. R. A. 791), and *Welsh v. Michigan Maple Co.*, 161 Mich. 16. The difficulty with this position is that the contract provides for more than a mere sale of goods by installment. It preserves definitely in the vendor the absolute right of cancellation:

"If the buyer fails to make payment when due."

"In neither of the cases cited did the contract contain any such provisions. Leaving out of the question plaintiff's default as to the April, May and June quotas, it was nevertheless clearly in default on the March quota, when on July 10th the contract was definitely repudiated by the defendant. We are unable to see how the provision that:

"This contract for all purposes shall be treated as separate for each installment,"

"deprives the defendant of its right to cancel. This language must be read in conjunction with the earlier provision of the contract providing for cancellation of the contract or postponement of shipment of future

installments. It is true that because of its own acts such cancellation cannot be made effective as to the February quota, but we can see no reason why the plaintiff's default as to the March quota cannot be made the basis of a valid cancellation as to the balance of the contract."

2. Did the defendant by its conduct estop itself from exercising the option to cancel? It is insisted that at the time the default occurred, on which the right of cancellation is based, the defendant was itself in default in not having made the second January shipment and by making such shipment after plaintiff's default it waived the right to cancel for that reason.

The contract provided for distributing the 900 tons to be shipped during 1916 in approximately equal quantities each month. Plaintiff had made a purchase from defendant which was delivered in 1915. Defendant did not ship in January until plaintiff notified it to do so. In response to such notification, dated January 20, 1916, it shipped a car on the 22d, and on February 3d it shipped the other car of the January shipment.

In support of its position, plaintiff quotes the following from 24 Am. & Eng. Enc. Law (2d Ed.), p. 1105:

"The right to rescind must be exercised promptly upon the discovery of the facts authorizing rescission. Any unreasonable delay in rescission, or any further dealing or action in respect to the contract as though it were still in force amounts to a ratification or election to abide by the contract and is a bar to a subsequent rescission."

—and cites in support thereof, *Edward Thompson Co. v. Vacheron*, 125 N. Y. Supp. 939; *Capper v. Paper Co.*, 86 Kan. 355 (121 Pac. 519).

While the right to rescind must be exercised promptly, we fail to find any unreasonable delay on the part of defendant after discovery of the facts on which

the rescission was based. The payment was due on February 1st, but, as defendant's counsel suggest, there was perhaps a question whether mailing it at Midland on that day would not be a compliance with the contract. Defendant's witness testified:

"We shipped a car on February 3d. I did not know at that time as to whether or not the payment which would be due February 1st was in the mail."

In the New York case above cited, which involved a sale of the publication of plaintiff, the payment became due on April 15th and a volume issued subsequently was sent to defendant on June 27th. This was held to be such an unreasonable delay as waived the default.

In the Kansas case, delay in remitting was held to have been waived, but the facts as stated show many defaults and for a considerable period of time. The evidence tended to show, as the jury found, that the defendant had repeatedly excused such defaults and made shipments long after they occurred. The decision in this case but followed the rule well stated in 2 Black on Rescission and Cancellation, § 604, wherein it is said:

"If, however, there has been repeated delay on the part of the purchaser in making his payments, and habitual indulgence on the part of the vendor in giving him time, so that the course of their dealings might reasonably lead the vendee to believe that strict compliance with the terms of the contract would not in the future be insisted on, then it would be inequitable to permit the vendor to take sudden and sharp advantage of a subsequent default and declare a forfeiture forthwith; and in order to preserve his right to do so, it will be necessary for him to give the vendee notice that he intends thereafter to insist on strict punctuality in payment, and the notice must be so timed as to give the vendee a reasonable opportunity to comply with its terms."

Waiver implies the abandonment of a right by a person entitled to exercise it, who has at the time full knowledge of the existence of the fact on which the right depends. Such knowledge and the intention to relinquish the right must concur. The facts relied on must also show that such intent was communicated to and so understood by the party claiming the waiver. It is, in effect, the abandonment of a particular obligation and an agreement to substitute another in its stead. 2 Black on Rescission and Cancellation, § 605 *et seq.*; 40 Cyc. (Waiver) p. 252.

The facts are not in dispute. The burden of proof to establish the waiver was on the plaintiff. To maintain it, it must show that defendant acquiesced in the continuance of the contract after its officers knew that it had a legal right to rescind. We think there is no competent proof from which such an inference might be drawn.

Neither are we impressed by the claim that defendant, being in default in not having shipped the second January car during that month, could not take advantage of its right to cancel. It was not in default at the time it exercised the right nor when it first had such knowledge as justified the action taken by it. Under the terms of the contract and the undisputed facts we find that defendant was legally entitled to rescind the contract and that there was no error in the trial judge so holding and directing a verdict in its favor.

The judgment is affirmed.

BIRD, C. J., and MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.



BATTIE v. ROTH.

1. INTOXICATING LIQUORS—TRIAL—INSTRUCTIONS.

In an action against a saloon keeper and his bondsman for an illegal sale of liquor to plaintiff's minor son, where defendant saloon keeper admitted that part of the liquor was drunk when plaintiff stepped around the partition to the bar, and denounced the sale, an instruction to the jury that plaintiff was so near to said minor son at the time that he could have prevented his drinking the liquor, but did not do so, *held*, erroneous and prejudicial.

2. SAME—BAR TO ACTION—ACQUIESCENCE—INFERENCES.

Where there was nothing in the record from which an inference could be drawn that plaintiff acquiesced in the furnishing of liquor to his minor son, an instruction to the jury that plaintiff could not recover for an illegal sale of liquor that he acquiesced in, was erroneous.

3. SAME.

Where the minor son had drunk part of the glass of liquor before plaintiff entered the bar, he was under no obligation to snatch the glass from his son's hand, and his failure to do so cannot be construed as acquiescence in the illegal sale.

4. SAME—MINORS—ILLEGAL SALES—GOOD FAITH—DEFENSES.

Under the provisions of the act (2 Comp. Laws 1915, § 7050), the good faith of the defendant in selling the liquor to a minor is no defense, and while it might have been considered by the jury in its award of damages, it was error for the trial court to submit it as a fact which, with others, would bar recovery.¹

5. SAME—EVIDENCE—MOTIVE—TRIAL—INSTRUCTIONS.

The trial court was in error in submitting to the jury testimony of defendant that he had had trouble with an older brother of the minor who was with him when the illegal sale was made, as tending to furnish a motive on the part of plaintiff for prosecuting the action, since there is nothing in the record to show that plaintiff knew of the incident.

¹The question of seller's ignorance of minority of purchaser of intoxicating liquor as defense to prosecution for sale to minor is discussed in a note in 25 L. R. A. (N. S.) 669.

Error to Muskegon; Vanderwerp (John), J. Submitted October 14, 1919. (Docket No. 33.) Decided December 22, 1919.

Case by Charles A. Battie against Henry Roth, principal, and the Michigan Bonding & Surety Company, surety, under the civil-damage act. Judgment for defendants. Plaintiff brings error. Reversed.

Simpson & Gale, for appellant.

Sybrant Wesselius, for appellee Roth.

A. F. Bunting, for appellee surety company.

SHARPE, J. This action was brought by the plaintiff to recover damages for the unlawful sale and furnishing of intoxicating liquor to his minor son, Owen Battie, during the period between May 1, 1917, and April 1, 1918. The defendant Roth was at that time engaged in the business of a saloon keeper in the city of Muskegon, and the other defendant was the surety on his bond as such. The case was submitted to the jury, who rendered a verdict for the defendants, on which judgment was entered. The plaintiff moved for a new trial, which was denied. He now appeals to this court, alleging errors in the charge of the trial judge and in the denial of such motion.

It is the claim of the plaintiff that, on several occasions, during the time alleged, the defendant Roth and his bartender sold spirituous and intoxicating liquor to Owen Battie, who was at that time but 18 years of age. Three young men testified positively to such sales by both Roth and his bartender. Owen testified that, before he began to get liquor at Roth's saloon, he turned over an average of \$10 per week of his earnings to his father but after that time he spent his money for liquor.

The front part of the saloon was separated from

the barroom proper by a short partition. In this Roth kept his safe. On the evening of March 30, 1918, Owen and his elder brother, Bert, entered the saloon. Roth cashed Owen's time check, taking the money from the safe, and Owen and Bert then stepped around the partition to the front of the bar and Owen asked for a drink. As to what then occurred, Roth testified:

"He came up and he says he wanted a drink, and I said, 'No, you look too young to me,' and he said, 'I am twenty-one,' and his brother stood there and he said, 'No, he is all right; he is twenty-one,' so Bert said. I said, 'He don't look old enough to me, but if you say he is all right, I will give you a drink,' and I set the bottle on the bar, and they poured out the drinks, and I put the bottle away, and the old gentleman walked around the bar and he said, 'I have got you. You sold my boy, nineteen years old.' That is the very words he said."

He later said, in answer to a question from his counsel:

"Q. When he (plaintiff) came around the partition, the boy hadn't drank the liquor yet?

"A. No, not entirely."

He also testified that before that he had had some trouble with Bert and had thrown him out of the saloon, and that Bert had then said, "I will get you."

The sections of our statutes (2 Comp. Laws 1915) which authorize this action read as follows:

"(7050) SEC. 20. Every person who shall by himself, or by any clerk, servant, agent or employe, sell, give or furnish, or cause to be sold, given, or furnished, any intoxicating * * * liquors * * * to any minor * * * shall in addition to all other penalties provided therefor by this act, be liable for both actual and exemplary damages therefor, to the father * * * in such sum, not less than fifty dollars in each case, as the court or jury shall determine.
* * *

"(7051) SEC. 21. The damages in all cases arising under this act, together with costs of suit, shall be recoverable in an action of trespass on the case before any court of competent jurisdiction. And in any case where parents shall be entitled to such damages either the father or the mother may sue alone therefor. But recovery by one of said parties shall be a bar to a suit brought by the other."

The first assignment of error is based on the instruction of the court wherein, in stating to the jury the claim of the defendant Roth as to the sale on March 30th, he said:

"That before the liquor was drunk by Owen Battie, the plaintiff stepped to the bar and said to Mr. Roth that he should not sell Owen liquor as he was only nineteen years old, and that plaintiff was so near to Owen Battie at the time that he could have prevented his drinking the liquor but did not do so."

This was doubtless presented to the court as a request to charge. While the court may properly state to the jury the claims of the respective parties, he should be careful to present only such claims as are founded on the testimony. As before stated, Roth admitted that a part of the glass of liquor had been drunk by Owen before plaintiff came around the partition. In view of this admission by him, the instruction was erroneous and prejudicial. The jury might well have inferred from the instruction that, in the opinion of the court, there was testimony of the defendant Roth supporting the claim as stated.

In the seventh assignment of error, the plaintiff complains of the following instruction:

"It is well-settled law that a party cannot recover for an illegal sale of liquor that he acquiesced in or that he furnished or that he could have prevented from being furnished, and his presence upon that occasion and not forbidding the delivery of the liquor was an acquiescence within the law which would bar him from recovery. While the sale of liquor without

the parent's consent is 'contrary to law, yet furnishing of liquor to a minor creates no liability unless damage is done, except for a minimum penalty of fifty dollars, and this penalty could not be recovered if no liquor was furnished except that which plaintiff acquiesced in."

This portion of the charge assumed that, from the proofs, the jury might find that the plaintiff acquiesced in the sale of the liquor to Owen. We fail to find anything in the record from which such an inference can be drawn. There is no evidence that the plaintiff ever bought liquor for Owen or that he was ever before present when Owen was drinking. He remonstrated with Roth for selling it to him. He was under no obligation to snatch the glass from his son's hand even were he in a position to do so. At least a part of the glass had been drunk before he arrived at the bar. The propriety of exercising parental authority at such a time and place may well be doubted. The defendants rely on the following authorities:

"In an action by a father if it appears that he has consented to and acquiesced in the sale of liquor to a minor son, such conduct on his part may in connection with other circumstances be a bar to an action by him. And where in an action by parents to recover damages for the death of their son resulting from his intoxication, vindictive damages are claimed, it is proper to show that on other occasions the father had visited other saloons in company with his son and had drank with him." Joyce on Intoxicating Liquors, § 451, p. 512.

See, also, *Rosecrants v. Shoemaker*, 60 Mich. 4.

The proofs do not bring this case within the rule laid down in either of these authorities. As stated by Mr. Joyce, it must appear that the father "consented to and acquiesced in the sale of liquor to a minor son," while in the *Shoemaker Case* the question involved was as to whether or not the plaintiff

"had encouraged and requested" the sale of liquor to her husband. The jury had the right to consider all of the facts incident to the sale in determining the damages to which plaintiff was entitled. But, in our opinion, there was no evidence which justified an instruction that they might find such a consent to, and acquiescence in, the sale on the part of plaintiff as would bar his recovery.

In the fourth assignment, plaintiff alleges error on the following instruction:

"If you find from the evidence in this case, gentlemen, that the only intoxicating liquor which the young man, Owen Battie, ever received or was sold at Mr. Roth's saloon and that the plaintiff, on that one occasion, stood by, and near enough to the young man to have prevented his drinking it, and did not do so, and that such liquor was furnished or sold to Owen Battie by Mr. Roth in good faith, believing the statements made to him at the time by the young man and his brother, Bert, that Owen was twenty-one years old, the plaintiff cannot recover in this case."

The court afterwards properly instructed the jury in this particular. He said:

"It is no defense in this case that from the appearance or statements of the minor or any other person, the defendant believed him to be of full age, as the law absolutely forbids the sale of intoxicating liquors to a minor, and any one selling or furnishing malt, brewed, fermented and intoxicating liquor to a minor, does so at his peril."

The good faith of the defendant was no defense, and, while it might have been considered by the jury in its award of damages, it should not have been submitted as a fact which would, with the other facts stated, bar a recovery.

We are also of the opinion that the testimony of the defendant as to the trouble which he claims he had at a previous time with Owen's older brother,

Bert, who was with him on March 30th, when the liquor was furnished, should not have been submitted to the jury as tending to show a motive on the part of plaintiff for prosecuting this action. There is nothing in the record to indicate that the plaintiff knew of it, and, even if Owen did know of it, this suit is not brought by him or for his benefit.

In view of what has been said, the other errors complained of are not likely to arise on another trial.

The judgment is therefore reversed, with costs, and a new trial granted.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

VINTON v. TOWNSHIP OF PLAINFIELD.

1. MUNICIPAL CORPORATIONS—HIGHWAYS AND STREETS—TOWNSHIPS—NEGLIGENCE—QUESTION FOR JURY.

In an action against a township for personal injuries alleged to have been received by reason of defendant's negligence in maintaining the highway in a reasonable state of repair under section 4586, 1 Comp. Laws 1915, testimony *held*, to present a question of fact for the jury.

2. SAME—CONTRIBUTORY NEGLIGENCE—RIDING ON DEFECTIVE HIGHWAY—QUESTION OF LAW.

It cannot be said that plaintiff was guilty of contributory negligence, as a matter of law, because he rode down a hill, on a defective highway, upon a load of straw, since the highways are made for farmers as well as others.

3. SAME—TRIAL—INSTRUCTIONS—CONTRIBUTORY CAUSES.

Where plaintiff used no breeching on his horses, and the

On the question of burden of proof of contributory negligence in action against township on account of defects in highway, see note in 13 L. R. A. (N. S.) 1219.

testimony as to the need of same was very conflicting, instructions by the court to the effect that the lack of breeching would not be important unless the jury found that it was one of the contributory causes of the injury, *held*, not misleading because negative.

4. **SAME—IMPUTABLE NEGLIGENCE.**

Negligence of the son, who was driving the team, would be imputable to plaintiff, who was riding on the load.

5. **TRIAL—OPINION OF TRIAL COURT—CREDIBILITY OF WITNESSES—INSTRUCTIONS.**

It is not for the trial court to intimate that an interested witness might not be truthful and accurate, or to express an opinion as to which witness was entitled to credence, in his instructions to the jury, where the conflict in testimony was very sharp.

6. **SAME—URGING JURY TO REACH VERDICT.**

Where the jury returned for further instructions, after having been out for a long time, the court was not in error in instructing them that it was desirable for them to reach an agreement if they could do so without violating their convictions and judgments, that they should reason together and it was just possible they might arrive at a verdict.

7. **SAME—CONFLICTING TESTIMONY—QUESTIONS FOR JURY.**

Where the case was full of conflicting testimony upon the controlling facts, *held*, that it was properly submitted to the jury.

Error to Kent; McDonald (John S.), J. Submitted October 28, 1919. (Docket No. 104.) Decided December 22, 1919.

Case by Simeon Vinton against the township of Plainfield for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Cornelius Hoffius and Fred P. Geib, for appellant.
M. Thomas Ward, for appellee.

MOORE, J. This is an action brought to recover

for the negligence of defendant in failing to keep a public highway in a condition reasonably safe and fit for travel, resulting, as plaintiff claims, in injury to him. From a judgment for \$850 in favor of the plaintiff, the case is brought here by writ of error.

The assignments of error may be divided into three groups:

(1) The refusal of the judge to direct a verdict in favor of the defendant.

(2) Refusal to charge as requested by defendant, and error in the charge as given.

(3) Error when the jury returned for further instructions, and in keeping the jury out unreasonably long.

1. It is said the defendant should have had a directed verdict because the record fails to show any actionable negligence on the part of the defendant. The statutory duty imposed upon townships to keep their highways in reasonable repair and convenient for public travel is found in section 4586, 1 Comp. Laws 1915. When the accident occurred to the plaintiff he was riding on a load of rye straw which witnesses say would weigh twelve to fifteen hundred pounds. The straw was on a hay rack, and to keep it in place ropes led from the four corners of the rack over the straw toward the center of the load where a binding pole was thrust through the rope and twisted until the ropes were drawn taut. The highway led down a hill over a high fill or embankment, then up another hill. The team was driven by a son of the plaintiff. It was claimed that the rains following down each hill made washouts or dips at the sides of the traveled portion of the road, and down the embankment.

It was claimed by the plaintiff that while going down the hill which slopes easterly on the highway, his son was using particular care in driving, and that

when the wagon reached the "dip" which existed in the left hand wheel track, the front wheels chucked toward the north and swung the team slightly to the north; that the front wheel and the rear wheel ran off the graveled portion of the highway; that the son pulled the team back to the south; that the front wheel came up on the gravel, the hind wheel grinding along the side of the gravel did not come back upon the road; that about six feet east of the dip, the hind wheel settled into the hole by the side of the graveled portion of the road; that part of the load tipped off and precipitated the plaintiff down over the embankment and as a result the plaintiff sustained a broken leg and injuries in and about the spine, which have caused the plaintiff to be permanently disabled. Considerable testimony was introduced tending to sustain the claim of the plaintiff. There was a sharp conflict of testimony in reference to the condition of the road at the place of the accident. The witnesses of the defendant maintaining that there was no hole beside the traveled portion of the highway; that there was no dip in the track west of the place of the accident, but that the accident was caused because of poor loading of the straw, which, with some assistance of the wind, made the load slip off at the place of the accident.

The charge was a long one, and in it appeared the following:

"If after consideration of the evidence you find that the defendant was not guilty of any negligence which was the proximate cause of plaintiff's injuries, you need not further consider the case. That is, if you find that the defendant did perform its statutory duty to make and keep that road in a reasonably fit and safe condition for public travel, then you need not further consider the case for, if you find that the defendant did make and keep the road in a reasonably safe and fit condition for public travel, it was not negligent, and, if it was not negligent, the plaintiff cannot recover.

"If, on the other hand, you find that the defendant was guilty of negligence, that is, it did not make and keep the road in a reasonably safe condition for public travel and that such negligence was the proximate cause of the injury, the plaintiff can recover providing he himself or his son were not guilty of any negligence which contributed in any degree to the injury; and that will bring you to the consideration of the second element of the plaintiff's case, namely: Was the plaintiff himself or by his son guilty of any negligence which contributed to his injuries? Such negligence we call contributory negligence.

"The law requires that a party claiming to be injured by the negligence of another must show that he himself was free from negligence that contributed to the accident. It must appear that he used ordinary care for his own safety. In this case if the young man who was driving the team was negligent, his negligence would be imputed to his father, the plaintiff. So, in determining whether the plaintiff was negligent, you will also consider if the son was negligent. Both knew of the condition of that road, and the law would require of them that they use care commensurate with the dangers known to them. The question is, Did the plaintiff or his son, knowing the condition of the road, use such care as men of ordinary prudence would have used under the same or like circumstances?"

We shall not attempt to set out the testimony in detail as to the condition of the highway. We think it presented a question of fact for the jury under proper instructions, which we think were given.

It is the further claim of defendant that the plaintiff was guilty of contributory negligence as a matter of law, in riding down the steep hill as a passenger on the load of slippery straw. This contention cannot be approved. The highways are made for use by farmers as well as others, and it cannot be said as a matter of law that one may not ride upon a load of straw without assuming all risk of accident because of a defective highway.

It is said the court erred in his charge to the jury relating to want of breeching on the harness. The court charged the jury as follows:

"The defendant also claims that an ordinarily prudent man would have used breeching on his horses in driving down such a hill as this was with such a load. The fact that there was no breeching on the harness would not be material unless you find that the lack of breeching was one of the contributory causes to the injury; whether considering the question of the plaintiff's negligence or the defendant's negligence, you find that either was guilty of negligence and that it had nothing to do with the injury, it is not important and you can forget it. So I say that whether he had breeching is not important or material if you find that the lack of breeching had nothing to do with the accident. The question is not whether breeching were necessary, or whether you think it would have been safer; whether you yourselves think it would be safer to have used breeching, that might be a matter of opinion or matter of judgment. A man would not be negligent if he used his best judgment and his best knowledge, even though his judgment was wrong. The question is in relation to this claim of negligence as I have explained in regard to the other, Did he use such care as an ordinarily prudent man would have used under the same circumstances? Considering all the facts and circumstances, the question is, Did the plaintiff use ordinary care for his own safety? If he used ordinary care, he would not be guilty of negligence. If he did not use ordinary care commensurate with the dangers as he understood them, he would be guilty of contributory negligence; and when I speak of the plaintiff I am referring also to the son who was driving the horses, and whose negligence, as I told you, if he were guilty of any negligence, would be imputed to the father."

Counsel say:

"What we are complaining of in the foregoing charge is that all of the statements of the court with reference to breeching were negative. He stated that the fact that there was no breeching on the harness

would not be material unless it was also found that the lack of breeching was one of the contributing causes to the injury, and again he said that whether he had breeching is not important or material if you find that the lack of breeching had nothing to do with the accident."

The testimony was very conflicting upon the need of breeching. Many witnesses testified that with such a load as was drawn in the instant case it would not be necessary, and at least one of them testified that it would be harmful. On the other hand there was testimony offered by the defendant that breeching was essential. We think the jury was not misled upon this subject by the charge.

Complaint is made because the court did not give without modification the following charge:

"In determining the weight to be given to the testimony of witnesses, you are entitled to take into account their interest, bias, and prejudice, if any, as it appears from the testimony, or as indicated by the witness upon the stand. You are also entitled to take into account in determining the weight to be given to testimony as to distances, size, depth, etc., the method by which the result was reached. That is, an interested witness who makes a guess as to a certain distance is not entitled to as much credence as the testimony of a disinterested witness who has made accurate measurements with appropriate instruments." Counsel citing *Perkins v. Township of Delaware*, 113 Mich. 377, and *Jones v. City of Detroit*, 171 Mich. 608.

The court said as to this charge:

"No. 3 I struck out. I will give this part of it, so far as I read. I did not intend to strike it all out, but the latter part of it I did not intend to give. In determining the weight to be given to the testimony of witnesses, you are entitled to take into account their interest, bias and prejudice, if any, as appears from the testimony or as indicated by the witnesses on the stand. You are also entitled to take into account in

determining the weight to be given to testimony as to distances, size, depth, etc., the method by which the result was reached."

The cases cited by counsel are easily distinguishable from the instant case. It was not for the court to intimate that an interested witness might not be truthful and accurate, or to express an opinion as to which witness was entitled to credence.

Did the court err in giving the jurors further instruction after they had been out a long time and in what was said to them? After a colloquy between the foreman, the judge, and one of the jurors, the record shows as follows:

"The Court: Have you got the charge there?

"The Reporter: Yes, your honor.

"The Court: I think you better read the charge. That would be the better and safer way.

"Mr. Geib: If the court please, I don't suppose it will be necessary to read the part relating to damages; only the part relating to the right to recover.

"The Court: I don't know.

"Mr. Juror Unterkircher: There is another I forgot to mention. Some of the jurors seem to take from your charge that the question of driving without a breeching should be eliminated from our verdict. Some of us understood you one way and some another.

"The Court: Well, I think you better listen to the charge. Before you start with that, did I speak loud enough for you to hear?

"Mr. Juror Unterkircher: We could hear here, but back there they could not.

"The Court: I ask that for my information and the reporter's in reading it. If some of you do not hear, just make it known.

"Mr. Geib: If the court please may I suggest that the reporter sit up here in this chair (indicating witness chair); I think that will help the jurors to hear better.

(Whereupon the reporter read to the jury the charge of the court, including such requests as the court gave, but excluding the part relating to damages and their computation.)

"The Court: Now, gentlemen, the verdict of the jury, of course, should represent the individual judgment of each and every juror. Nevertheless, it is desirable that you reach an agreement, if you can do so, without violating your convictions and judgments; and in order to bring that desired end about, you should reason with each other, listen to each other's arguments, and see if possibly you might be wrong and the other juror might be right. By listening to what each other has to say it is just possible that you can arrive at a verdict. I don't know as it is necessary for me to say that to you, because I am satisfied that you have been doing everything that you honestly could to arrive at a fair verdict. I know from my experience with jurors that some jurors are very settled and firm in their convictions, and they do not care to argue with other jurors about it at all. That probably is not the case with any of you; but it is your duty to argue with each other, listen to what the others have to say, in order that you might arrive at an agreement. That is all I care to say in regard to that. You may retire."

We do not think this was error. See 38 Cyc. p. 1899; *Kelly v. Emery*, 75 Mich. 147; *Knapp v. Railway Co.*, 114 Mich. 199; *Stevenson v. Railway Co.*, 118 Mich. 651; *Richardson v. Railway Co.*, 182 Mich. 206.

The case was full of conflicting testimony upon the controlling facts and was properly submitted to the jury under the following authorities: *Speck v. Township of Bruce*, 166 Mich. 550 (35 L. R. A. [N. S.] 203), and the many cases cited therein; *Highland v. Township of Garfield*, 168 Mich. 538; *Loose v. Township of Deersfield*, 187 Mich. 206; *Pool v. Township of Montague*, 194 Mich. 476; *McIntyre v. Township of Grant*, 206 Mich. 223.

Judgment is affirmed with costs in favor of the plaintiff.

BIRD, C. J., and SHARPE, STEERE, BROOKE FELLOWS, STONE, and KUHN, JJ., concurred.

MACLACHLAN v. CITY OF DETROIT.

1. EVIDENCE—DEEDS—STREETS—DEDICATION OF PLAT—MUNICIPAL CORPORATIONS.

Testimony by one of the stockholders of a corporation owning a plat that, in dedicating the same to the city, a boulevard shown therein was offered as a boulevard and not as an ordinary street, and that the same was accepted as such, *held*, admissible.

2. MUNICIPAL CORPORATIONS—STREETS—BOULEVARDS—TAXATION—SPECIAL ASSESSMENTS—PAVING TAX.

Where a plat in the city of Detroit containing a street of extra width was dedicated and accepted with the understanding that the same should be a boulevard and that funds for its improvement should be raised by general tax as provided in the charter of said city for improving parks and boulevards, the action of the city council in afterwards placing said boulevard under the control of the street committee and assessing a special tax for paving against abutting owners, *held*, illegal and void.

3. SAME—ESTOPPEL.

The status of plaintiff, a purchaser of a lot abutting said boulevard, in a suit to enjoin the collection of said illegal tax, could not be affected by the fact that one of the aldermen who voted for the paving was one of the stockholders in the corporation owning said plat.

BROOKE and KUHN, JJ., dissenting.

Appeal from Wayne; Chester (Guy M.), J., presiding. Submitted January 23, 1919. (Docket No. 96.) Decided December 22, 1919.

Bill by Annie E. MacLachlan against the city of Detroit and another to enjoin the collection of a paving tax. From a decree for plaintiff, defendants appeal. Affirmed.

Arthur Schueler, for plaintiff.

Walter Barlow (*Allan H. Frazer*, of counsel), for defendants.

MOORE, J. This is a bill filed to enjoin defendants from collecting a tax spread upon the lands of plaintiff for the paving of a street in front of her premises. While the amount involved in this case is \$168, it is agreed by counsel that it is a test case involving about \$60,000. From a decree in favor of the plaintiff the case is brought here by appeal.

After the hearing, the trial judge filed an opinion which reads:

"The Marshland Boulevard Land Company was interested in the lands platted, a portion of which are involved in this suit, and presented to the common council of the city of Detroit a proposed plat; that the plat showed various streets paralleling and crossing each other, with names which referred to them as streets. This plat also showed a street wider than the other (being 70 feet), which was given the name, 'Marshland boulevard.' Later a strip ten feet wide was added, making the boulevard 80 feet wide.

"The common council accepted and approved the plats, and the same were recorded in the office of the register of deeds. By resolution the common council changed the name 'Marshland boulevard' to 'Lakewood boulevard.'

"On February 17th, 1914, the common council, by resolution, placed Lakewood boulevard under the control of the department of parks and boulevards, and made it a part of the park and boulevard system, and directed the commissioner to take possession of and maintain the same as a part of the park and boulevard system of the city of Detroit.

"On March 2, 1914, plaintiff purchased the lot in question on Lakewood boulevard. On April 18, 1916, the common council of the city of Detroit passed the two following resolutions:

"Resolved, that the report of the committee on parks and boulevards, and the accompanying resolution of Alderman Jakel

adopted on February 17th, 1914, placing the street or highway known as Lakewood boulevard, and extending southerly from Jefferson avenue, between Coffin and Chalmers avenues, under the control of the department of parks and boulevards and making the same a part of the park and boulevard system, and authorizing and directing the commissioners of parks and boulevards to take possession of and maintain the same as a part of the park and boulevard system of the city of Detroit, be and the same is hereby rescinded.

"Resolved, that the department of public works be and is hereby requested to consider the advisability of paving Lakewood boulevard, from Jefferson avenue to Essex avenue, with cedar on concrete foundation, under the six hundred thousand dollar clause of the charter."

"This action was taken without any notice to the platters of this property and without any notice to the abutting owners on Lakewood boulevard that this boulevard was to be transferred from the park system to the street committee.

"Following this proceeding, Lakewood boulevard was paved, and the cost assessed to the abutting property owners.

"The language used in the two deeds of dedication is substantially the same. Naming the grantor, the following is the language used:

"Has caused the land embraced in the annexed plat to be surveyed, laid out and platted * * * and that the streets and alleys shown on said plats are hereby dedicated to the use of the public."

"The term 'boulevard' means more than the term 'street.' A boulevard is a public street usually wider than the ordinary street, and is given a park-like appearance by being beautified with trees, flowers and the like, and is not used for heavy teaming.

"That grantors intended Marshland boulevard, so-named, as a boulevard, is apparent from the plat, because of its name and its being wider than all other public highways named on the plat.

"It is also apparent that the city of Detroit, in accepting and approving the plat, understood and accepted Marshland boulevard, so named, as a boulevard. The city changed its name to Lakewood boulevard, and placed it under the control of the department of parks

and boulevards, and made it a part of the boulevard system and directed the commissioner to take possession and maintain the same as a part of the park and boulevard system of the city of Detroit.

"This being the understanding of both parties, as shown by the plats which are a part of the grants, and the proceedings of the city of Detroit, as shown by the proceedings of the common council, then it should be construed as creating a boulevard which is to be improved and maintained under the provisions of the charter of the city of Detroit with reference to parks and boulevards.

"Plaintiff having purchased property abutting on Lakewood boulevard while the same was a part of the park and boulevard system of the city of Detroit, her rights therein and her status with reference thereto cannot be changed without notice to her of the proposed change and she being given an opportunity to be heard. She was not given this opportunity.

"The city of Detroit having accepted Lakewood boulevard and having made it a part of its park and boulevard system, and while it was a part of such system, plaintiff having acquired property abutting thereon, then the city should be bound by the charter provisions with reference to boulevards until the same has been abandoned as such by legal proceedings for that purpose.

"The grounds under the control of the park and boulevard commissioner shall be used and enjoyed solely for the purposes for which they were established. Charter of Detroit [1904], § 554.

"Boulevards cannot be used the same as ordinary streets. Certain restrictions are made applicable to boulevards which do not apply to ordinary public streets, and these restrictions apply to Lakewood boulevard. See Charter of Detroit [1904], §§ 572, 573, 574, 575, 576, 578, 582, 583, 585 and 590.

"Sec. 546. The commissioner of parks and boulevards shall have the control and management, and shall have charge of the improvements of all the parks and public grounds of said city, including the island park, known as Belle Isle park, and of such parks and public grounds as may hereafter be acquired, laid out, purchased or dedicated for public use in said city. And he shall likewise have the control, management, and charge

of the improvement and maintenance of the boulevard, which was laid out and established by the act creating said board of boulevard commissioners, and of any other boulevard which may at any time be hereafter acquired, laid out, established or located by said city. The authority hereby conferred shall not be construed as giving any charge or control to said commissioner over and to the improvement of any of the ordinary public streets or alleys.' * * *

"SEC. 548. The commissioner shall, annually, before the first day of April, prepare and submit to the common council an estimate of the amount of money that should be raised for the ensuing fiscal year for the purpose of improving and maintaining the grounds under his charge, which estimate shall specify the sums desired for each of the several objects of expenditure, and at the same time make a report to the common council of the amount of revenue and income which it is estimated shall be received during such fiscal year from any source. * * *

"SEC. 549. The common council of said city with the consent of the board of estimates, may cause to be placed upon the general tax roll, and raised by tax the same as other taxes, such sum as they may think proper to be raised for each of the several objects of expenditure, estimated as aforesaid, the maintenance and improvement of said parks, public grounds and boulevards, or for the payment of any other expenses which said commissioner is, by this act, authorized to incur.' * * *

"Under the foregoing circumstances, and considering these provisions of the city charter and the case of *Scovel v. City of Detroit*, 159 Mich. 95, I think it follows that this special assessment is not authorized in the law, and is void.

"A decree may be entered in accordance with these findings."

Only one witness, Mr. Freud, was sworn. He testified in substance that before filing the plat he appeared before the committee of the council and explained to them that his company was offering the boulevard as a boulevard and not as an ordinary public street.

"I suggested to the committee that if they would accept this as a boulevard we would make the street wider and plan it as a boulevard—we might have

planned it in several other ways more advantageously and more profitably to our company, by making the street fifty feet wide, or sixty, and adding the property, the difference, to the surrounding lots—in fact, we might have saved a good deal more property because it was only necessary for us to give one-half of the street—either twenty-five or thirty feet, and the people west of us would be compelled to give the other twenty-five or thirty feet.

“Q. You did not own the property west of it?

“A. We did not—so I pointed this out to the committee and offered it to them as a boulevard, and they accepted it as such, and our plat was recorded. We made the street, at that time, seventy feet wide. It was then known as Marshland boulevard and subsequent to that time the Marshland Boulevard Land Company purchased the property west of this boulevard. * * * On August 11, 1913, we filed a petition with the common council of the city of Detroit for the acceptance of a proposed plat west of this boulevard. * * *

“Q. At that time, Mr. Freud, what was said by you to the committee about the additional ten feet to the boulevard?

“A. I appeared before that committee and I suggested to them that inasmuch as this was a boulevard—very fine street, that we would be willing to give them an additional ten feet to make it a much better street—we might have added this on to the lots—made our lots a good deal more valuable. We offered it to the city and they accepted it and the street on our plat was marked distinctly Lakewood boulevard. * * *

“Q. Would you have offered that property to the city, either Marshland or Lakewood boulevard, had it been an ordinary street?

“A. I would not.

“Q. Did you offer it for the purpose of enhancing the value of that boulevard as a boulevard?

“A. Yes, and that is the only reason.

“Q. Was there an extended agitation in the city about this Riverside boulevard?

“A. Very much—there were several meetings held publicly—the city planned improvements and there

were very elaborate plans drawn for this Riverside boulevard. * * *

"Q. That was at the southerly end of your property?

"A. Southerly end of the property. * * *

"Q. Had you talked with the City Plan and Improvement Association?

"A. Yes. And the members of the council were satisfied with our offer; they were very much pleased with it."

It is now the claim of the city—we quote from the brief:

"The dedication of the public streets in the Marshland boulevard subdivision was made in the following language:

"Know all men by these presents: That the Grosse Pointe Land Company has caused the land embraced in the annexed plat to be surveyed, laid out and platted, to be known as "The Marshland boulevard sub. of part of private claim 321, Detroit, Wayne county, Michigan," and that the streets and alleys shown on said plat are hereby dedicated to the use of the public."

"On the 19th day of April, 1910, the common council of the city of Detroit approved and accepted said plat. The language used by said common council in accepting and approving said plat, was as follows:

"Resolved, that the plat of Marshland boulevard subdivision, part of private claim 321, be and the same is hereby accepted and approved, and the commissioner of public works be and he is hereby directed to sign and approve the same."

—and that the same language was used as to the second plat. * * *

"The resolution of the common council adopted February 17, 1914, placing Lakewood boulevard under the control of the department of parks and boulevards of the city, referred to it as a 'street or highway.'

"The resolution of the common council adopted April 18, 1916, rescinding the resolution of February 17, 1914, referred to Lakewood boulevard as a 'street or highway.' It was a boulevard in name only. Its name 'Lakewood boulevard' carries with it no more significance than the name of the street, 'Broadway'

in city of New York, or the name of the street 'Commonwealth avenue' in the city of Boston, or the names of streets, 'Boston boulevard,' 'Chicago boulevard,' 'Dexter boulevard,' 'Hamilton boulevard,' 'Lafayette boulevard,' 'Park boulevard,' 'Washington boulevard,' and others in the city of Detroit,"

—and that the city had the right to pave this street the same as any other street, citing among other authorities *Burridge v. City of Detroit*, 117 Mich. 557 (42 L. R. A. 684), and *Newberry v. City of Detroit*, 184 Mich. 188. These cases are both dissimilar from the instant case. The first was a personal injury case involving the liability of the city for a defective sidewalk, and in the last-named case there was no claim of exemption from taxes because the street paved was a boulevard.

The claim of the city involves the proposition that Mr. Freud's testimony was incompetent and the further proposition that nothing was accomplished by the council formally placing the street under the control of the department of parks and boulevards. We think the case is controlled by the principles stated in *Scovel v. City of Detroit*, 159 Mich. 95. See, also, *Conkling v. Village of Mackinaw City*, 120 Mich. 67; *White v. Smith*, 37 Mich. 291; *McArthur v. City of Cheboygan*, 156 Mich. 152; *Crosby v. City of Greenville*, 183 Mich. 452.

The counsel for the city urge that Mr. Burton, who was an alderman and also a stockholder in the company with Mr. Freud, and his brother voted to rescind the action of the council in putting the street under the control of the park and boulevard commission and also voted for the paving of the street. We do not see how this action on the part of Mr. Burton can affect the status of the plaintiff.

The decree is affirmed with costs to the plaintiff.

BIRD, C. J., and STEERE, FELLOWS, and STONE, JJ., concurred with MOORE, J.

BROOKE, J. (*dissenting*). The facts involved herein are sufficiently set forth in the opinion of my Brother MOORE. I desire only to emphasize the form of the dedication, which is as follows:

"Know all men by these presents: That the Grosse Pointe Land Company has caused the land embraced in the annexed plat to be surveyed, laid out and plat-
ted, to be known as 'The Marshland boulevard sub. of part of private claim 321, Detroit, Wayne county, Michigan,' and that the streets and alleys shown on said plat are hereby dedicated to the use of the public,"

—and the resolution of the common council accepting said plat in the following terms:

"Resolved, that the plat of Marshland boulevard subdivision, part of private claim 321, be and the same is hereby accepted and approved, and the commissioner of public works be and he is hereby directed to sign and approve the same."

Like language of acceptance and dedication was used as to the adjoining plat. I call attention to the language of dedication and acceptance for the purpose of emphasizing the fact that nothing is shown of record indicating that "Lakewood boulevard" was treated either by the owners of the property in dedicating, or by the city authorities in accepting the plat, in any manner which would distinguish it from an ordinary street. Although the claim is made in the brief of counsel for plaintiff that the mere calling of a street a boulevard has some bearing upon the question here involved, I am of the opinion that such claim is utterly without foundation. We have in the city of Detroit as pointed out by counsel for the defendant many so-called "boulevards" which are simply "streets"; among them the following: Boston, Chicago,

Dexter, Hamilton, Lafayette, Park, Washington, most of which remain under the jurisdiction of the board of public works. Nothing therefore can be predicated upon the mere use of the word "boulevard" instead of "street." Plaintiff's right, if any, in the premises must be based on the testimony of Mr. Freud, and upon the resolution of the common council of February 17, 1914.

The law relative to the admissibility of Mr. Freud's testimony is stated as follows:

"To show the intention of the alleged dedicator with reference to acts of dedication either for or against the dedication, his declarations made at the time of the acts or so near that time as to be a part of the transaction are admissible in evidence as a part of the *res gestæ*. Such declarations will not be admissible, however, after the dedication has become irrevocable by acceptance." 13 Cyc. p. 472.

See cases cited in note 18. My conclusion is that Mr. Freud's testimony should have been excluded, and, so excluded, there remains only for consideration the legal effect of the resolution of February 17, 1914, placing "the street or highway known as Lakewood boulevard * * * under the control of the department of parks and boulevards." Two years later and on April 18, 1916, this resolution was rescinded. In the meantime no money had been appropriated by the city of Detroit for the paving of Lakewood boulevard at public expense.

Assuming but not determining that the common council of the city of Detroit has authority by mere resolution to change the character of a highway from that of an ordinary "street" to a "boulevard" and place it under the jurisdiction of the department of parks and boulevards, such action is simply an exercise of a legislative function which may in the discretion of the legislative body be changed or rescinded at any

later time. In other words the power to enact, in the absence of contractual relations, implies the power to rescind.

The case of *Scovel v. City of Detroit*, 159 Mich. 95, cited and relied upon by counsel for plaintiff, has no bearing upon the question here under consideration. In that case the court had under consideration the Grand boulevard encircling the city of Detroit, provided for by an act of the legislature in which there appears the following:

"The city of Detroit may annually raise and appropriate funds for the uses and purposes of the said boulevard, but shall raise the same by taxation only, and after approval of the board of estimates and in the manner provided by law for raising funds for the general purposes of the said city." Act No. 374, Local Acts 1879, § 16.

The conveyance from Scovel to the city contained the following language:

"Said strip of land is conveyed only for the use of a public boulevard as contemplated by Act No. 374, passed by the legislature of Michigan in 1879," etc.

In passing upon the question there involved this court said:

"The language of the deeds that 'said strip of land is conveyed only for the use of a public boulevard as contemplated by Act No. 374,' etc., should be construed, in the light of surrounding circumstances, as referring to a boulevard to be improved and maintained by general taxation only. Under this construction the acceptance of the deeds by the city raised an implied contract, at least, not to levy special assessments upon the grantor's abutting property."

It cannot be contended that the dedication and acceptance in the case at bar imports any contractual relations between the city and the owners by the terms of which the street known as Lakewood boulevard should be improved at public expense. I am of the

opinion that plaintiff, in purchasing her lot upon the street in question after the resolution of the common council placing said street under the jurisdiction of the department of parks and boulevards was passed, must be held to have done so with the knowledge that the power to enact said legislation implied a power to rescind and therefore that at any time thereafter the common council might, as it ultimately did, withdraw said street from the jurisdiction of the department of parks and boulevards and return it to its status as a common or ordinary street, improvement of which in the first instance is, under the charter assessable to the abutting owner.

A decree should be entered in this court dismissing plaintiff's bill of complaint with costs.

KUHN, J., concurred with BROOKE, J.

The late Justice OSTRANDER took no part in this decision.

FLOWERS v. WAYNE PROBATE JUDGE.

1. APPEAL AND ERROR—APPEALS FROM PROBATE COURT—TIME.

On certiorari to review an order in mandamus proceedings to compel the judge of probate to allow an appeal from the decision in an executor's final account, and to approve an appeal bond, where it appears that said decision was rendered on January 3d and notice of appeal with reasons therefor and an appeal bond were left with the probate court on January 20th, but the surety on said bond did not justify until January 24th, the probate judge

not having been requested to nor having fixed the amount of said bond, the appeal was not perfected within 20 days as required by the judicature act (3 Comp. Laws 1915, § 14145), and said order will be reversed.

2. SAME—CERTIORARI—INTEREST OF PROBATE JUDGE.

The probate judge has such an interest in the proceedings as to authorize him to bring certiorari, and the motion to dismiss same is overruled.

3. SAME—PROBATE COURTS—EXTENSION OF TIME—ABUSE OF DISCRETION.

Held, under the showing made, that it was an abuse of discretion on the part of the probate judge to refuse an extension of time in which to make an appeal, under 3 Comp. Laws 1915, § 14145.

BIRD, C. J., dissenting.

Certiorari to Wayne; Goff (John H.), J. Submitted October 7, 1919. (Calendar No. 28,750.) Decided December 22, 1919.

Mandamus by Charles Flowers, executor of the will of Jane Armstrong, deceased, to compel Edward Command, probate judge of Wayne county, to vacate an order denying an appeal. From an order granting the writ defendant brings certiorari. Reversed, and order vacated. Plaintiff also filed a motion to dismiss the writ of certiorari. Motion denied.

Bishop & Kilpatrick, for appellant.

William Look, for appellee.

MOORE, J. We have two motions before us which were argued as one and will be considered in the same way. The first of them is certiorari to Hon. John H. Goff, circuit judge, to review his order allowing writ of mandamus directed to judge of probate, defendant herein, requiring him to allow the plaintiff to appeal from his decision on the final account of plaintiff as executor in the matter of the estate of Jane Arm-

strong, deceased, and to approve the bond filed therein. The other motion is one to dismiss the writ of certiorari as improvidently issued because the defendant had no interest in the litigation. The facts are not in dispute. A supplemental final account on October 3, 1918, showing a balance due said estate of \$5,009.59 was filed by Mr. Flowers. On January 3, 1919, defendant rendered his decision finding the sum of \$8,827.39 due from the said executor to said estate. January 20, 1919, William Look, attorney for the executor, left with the probate court a written notice and reasons for appeal from the said order of the probate court, and a bond on appeal in the sum of \$300, signed by Frederick T. Ranney, as surety. Mr. Ranney did not justify as surety. The bond was submitted in the usual course of business to defendant, as probate judge, for approval, at which time defendant discovered that the surety had not justified, defendant caused said bond, together with the notice and reasons for appeal, to be mailed to the attorney for said executor on the afternoon of the 23d of January. These papers came to Mr. Look on the morning of the 24th day of January, and on the same day the attorney for the executor tendered to defendant, as probate judge, for approval and filing, a proposed bond on appeal in the sum of \$300, with Frederick T. Ranney, who had justified as surety, and on said mentioned date defendant refused to approve the said bond. On January 31, 1919, Mr. Flowers, executor, filed a petition in the probate court, seeking an extension of time to make and perfect an appeal from the aforesaid order, and upon the petition coming on to be heard on February 27, 1919, defendant declined to grant an extension of time. On March 6, 1919, Mr. Flowers caused a petition to be filed in the circuit court for the county of Wayne, praying that a writ of mandamus issue to defendant. Praying among other things as follows:

"that a writ of mandamus may issue to the Honorable Edward Command, judge of probate as aforesaid, commanding him to allow and approve of your petitioner's claim and bond on appeal or that he grant the extension of forty days for taking and perfecting such appeal as provided by section 1, chapter 65 [3 Comp. Laws 1915, § 14145 *et seq.*], entitled 'Of Appeals From the Probate Court,' and that such other order may be had in the premises as justice may require."

An answer was filed by the defendant in which the following was stated:

"On February 27th, 1919, your petitioner declined to grant an extension of time to file notice and claim of appeal, and bond on appeal and upon the facts and evidence before respondent, respondent shows that he was warranted and legally justified in so doing. Respondent further shows that relator had had a full and fair hearing upon the allowance of his final account, and the determination of the amount due from relator to said estate was just and equitable and in accordance with the facts and evidence in the case, and that relator's disobedience of the repeated orders of the probate court and relator's dissipation of the assets of said estate and mismanagement of said assets fully justified and legally warranted the discretion of respondent in declining to grant an extension of time as prayed by relator; and that it did not appear to respondent that justice required a revision of the aforesaid order of the probate court."

After a hearing the court ordered defendant, among other things, to forthwith allow the said claim and notice of appeal, and also approve of the bond in the sum of \$300. Nothing was said in the order about whether the probate judge should have granted an extension of time in which to grant an appeal.

In section 1 of chapter 65 of the judicature act (3 Comp. Laws 1915, § 14145), are the provisions relating to the taking of appeals to the circuit court from the probate court, and to the granting of the extension of time by the probate judge for the taking of

appeals. The bond referred to in that section is mentioned in detail in section 14152. It would have been a proper thing to do for the probate judge, instead of returning the papers filed as aforesaid to the attorney in the afternoon of the last day for taking an appeal, to have had his register call the attention of the attorney to the defect in the bond and give him an opportunity to correct the defect if he could within the 20 days, but this was not done and we feel bound to say that the appeal was not perfected within the 20 days, the probate judge not having been requested to, nor having fixed the amount in which such bond should be given (see *Sokup v. Davis' Estate*, 206 Mich. 144), and that the order of the circuit judge in that respect is wrong. We also think, upon the showing made, that it was an abuse of discretion on the part of the probate judge to refuse an extension of time in which to make an appeal, and if the circuit judge had so held we should have approved his order, but he did not so hold.

The defendant has such an interest in the proceeding as to authorize him to bring certiorari and the motion to dismiss the certiorari proceedings is overruled.

We are constrained to hold that the order of the circuit judge for mandamus must be reversed and vacated with costs to the defendant. This ruling is made without prejudice to the right of Mr. Flowers to petition the circuit court for a delayed appeal under the provisions of section 14156, 3 Comp. Laws 1915.

SHARPE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred with MOORE, J.

BIRD, C. J. (*dissenting*). I am unable to agree with the conclusion reached by Mr. Justice MOORE in this case. The notice of appeal and bond were filed within the 20 days allowed by law. There is no claim that

the notice was defective but it is conceded that the bond was defective because no justification of the surety was indorsed thereon. Three days after the bond was filed the defect was called to plaintiff's attention, whereupon he at once caused it to be corrected, but not until after the 20 days had expired. It was, in my opinion, just such situations as this that moved the legislature to enact the following provisions:

"(12486) SEC. 9. No appeal shall be dismissed on account of any informality or imperfection in the bond, affidavit or other proceedings, for the taking of such appeal, if plaintiff shall either by amendment, or by furnishing a new bond, affidavit or other paper, supply the deficiency or defect.

"(12487) SEC. 10. Whenever a bond is or shall be required by law to be given by any person, in order to entitle him to any right or privilege conferred by law, or to commence any proceeding, it shall not be necessary for such bond to conform in all respects to the form thereof prescribed by any statute, but the same shall be deemed sufficient if it conforms thereto substantially, and does not vary in any matter to the prejudice of the rights of the party to whom or for whose benefit such bond shall have been given.

"(12488) SEC. 11. Whenever such bond has been heretofore, or shall hereafter be given, and shall be defective in any respect, the court, officer, or body who would be authorized to receive the same, or to entertain any proceedings in consequence of such bond, if the same had been perfect, may, on the application of all the obligors therein, amend the same in any respect, or may, on the application of the person required to give such bond, allow a new one to be substituted in the place thereof, bearing date at the time when such bond was required to be given, and such bond shall thereupon be deemed valid from the time of the execution of such defective bond. When application is made to amend, said court, officer, or body shall have power to amend such bond in any respect, and without regard to the particular amendment applied for, so as to make said defective bond such a

one as might have been required when the latter was given. When a new bond is allowed, it shall be such in form, penalty, and other respects, as might have been demanded when the defective bond was given." 3 Comp. Laws 1915, §§ 12486-12488.

It is clear that these sections contemplate that a defective bond may be corrected or a new one filed, and it is equally clear that when this is done, it shall have relation back to the time when the original or defective one was filed, and have the same force and effect it would have had if no defect had existed. If it does not mean this, why was the provision inserted in section 12488 that the court may "*allow a new one to be substituted in the place thereof, bearing date at the time when such bond was required to be given, and such bond shall thereupon be deemed valid from the time of the execution of such defective bond.*" Indeed, it would be difficult for language to make it plainer. This section said to plaintiff, in substance: "Correct the defect in your appeal bond or file a new one, and after doing so you may date it back within the 20 days provided for appeal." If we hold that plaintiff's corrected bond came too late to authorize an appeal, how will we construe this provision and what will we say is the meaning of the words "such bond shall thereupon be deemed valid from the time of the execution of such defective bond?" It is obvious that this legislation was passed for the purpose of preventing appeals being lost by reason of defective bonds, where the opposite party is not thereby prejudiced, and it seems to me that these sections are directly applicable to the present case. If we are to say that they are not available in any case where the corrected or substituted bond is not filed until after the time for appeal has expired, then the legislation is in vain because if one discovers the defect before the time for appeal has expired he could file a new bond without the aid of the statute.

Some point is made by the respondent in his return that he was never requested to fix the penalty of the bond, and the inference to be drawn therefrom is that had he been so requested he would have exercised his discretion under section 14152, and ordered a bond in compliance therewith. This section provides that where a final account is the subject of appeal the court "may, in its discretion, fix the penalty of the bond in such sum as will cover the amount found due by the probate court upon examination of such account."

* * * Had the defendant intended to exercise his discretion in this appeal and require a compliance with the foregoing provision, he should have frankly advised plaintiff to that effect, when he tendered the corrected bond. The only reason respondent assigned for refusing to file the bond was because no justification by the surety was indorsed thereon. There is no claim that a bond in the penalty of \$300 is not sufficient to take care of the costs of appeal, and inasmuch as plaintiff has on file in his court a \$15,000-bond, and less than \$9,000 are here involved, the estate would not be seriously prejudiced by reason of a failure to invoke this provision.

I am impressed that plaintiff has done everything which the statute requires him to do in order to effect his appeal. The trial court was of that opinion and I think its order should be affirmed.

MCQUINN v. RUNNING.

DEEDS—CANCELLATION OF INSTRUMENTS—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.

Allegations in a bill to set aside a deed and for an accounting for personal property given to defendants in consideration of their furnishing to plaintiff, who was 68 years old, alone in the world, sick and unable to help himself, his board, clothing, medical attendance, etc., for life, on the ground that same were obtained by duress, undue influence, etc., *held*, not supported by a preponderance of the testimony.

Appeal from Lapeer; Williams (William B.), J. Submitted October 30, 1919. (Docket No. 74.) Decided December 2, 1919.

Bill by Archie Wilson against James Running and another to set aside a deed, and for an accounting. There was a decree dismissing the bill. Pending an appeal, plaintiff died and William McQuinn was appointed administrator, and perfected the appeal. Affirmed.

Herbert W. Smith, for plaintiff.

Theo. D. Halpin, for defendants.

MOORE, J. The bill of complaint in this case is filed for the purpose of setting aside a deed given by Archie Wilson on June 1, 1916, to the defendants, of 30 acres of land. The bill also asks that personal property may be restored to the said Archie Wilson, and that an accounting may be had for such personal property as has been disposed of by the defendants. Mr. Wilson was 68 years of age and was the owner of 30 acres of land upon which he had lived alone for a number

of years. This deed and transfer of personal property is claimed by the plaintiff to have been obtained by the defendants by duress, undue influence, misrepresentation and by taking advantage of him while he was sick in bed, in a weakened condition and unable to realize what he was doing. The defendants denied the averments of the bill. The case was tried in open court and a decree was entered dismissing the bill of complaint. Pending an appeal to this court Mr. Wilson died. An administrator was appointed. The death of plaintiff was suggested of record. The case is brought here by appeal. Plaintiff at the time the deed was made was 68 years old, and had never married. He had no relatives. He was found by one of his neighbors alone in his house, and sick; he was not able to care for himself, and there was no person living who was under any obligation to take him in and care for him. This neighbor, Mr. Bearinger, at his request, sent for the defendants, who at his request took him to their home and gave him care and furnished him with a doctor. The property mentioned in the bill of complaint was worth \$700 to \$1,000.

The decisive questions in this case are questions of fact. The plaintiff was the only witness in his own behalf. The defendants produced five witnesses besides themselves. Among them was the neighbor who discovered Mr. Wilson when he was sick, the doctor who attended him, and the scrivener who for many years had been register of deeds for Lapeer county, who drew the papers and before whom they were executed. In the life lease was the following:

"And said first parties agree to furnish him board and clothing, and in sickness, medical attendance, and support and maintain him during his natural life, and at his death furnish him a proper burial."

Mr. Wilson was contradicted by each of the witnesses for defendant, upon some essential point. It

would profit no one to recite the testimony in detail. It decidedly preponderates in favor of the claim of the defendants.

The decree is affirmed, with costs to defendants.

BIRD, C. J., and SHARPE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

COPPER RANGE CO. *v.* ADAMS TOWNSHIP.

1. TAXATION—VALUATION OF PROPERTY—FRAUD.

Before the court is justified in holding a tax to be illegal because the assessing officers acted fraudulently, that fact should be clearly shown by the evidence; an error of judgment by the officers in their valuations of property being insufficient.

2. SAME—EVIDENCE—SUFFICIENCY.

In an action by a mining company against a township to recover a portion of taxes claimed to have been excessive, and paid under protest, the finding of the court below that it was unable to find in the action of any of the assessing officers, whose action is questioned, or of the board of tax commissioners, any evidence of fraud or unfairness or of any effort to shift taxation from one mining property to another, *held*, justified by the record.

Error to Houghton; O'Brien (Patrick H.), J. Submitted October 23, 1919. (Docket No. 4.) Decided December 22, 1919.

Assumpsit by the Copper Range Company against the township of Adams for taxes paid under protest. The State board of assessors, the board of State tax

commissioners, the St. Mary's Mineral Land Company, and the South Range Mining Company intervened as parties defendant. Judgment for defendant. Plaintiff brings error. Affirmed.

Stone, Weider & Schulte, for appellant.

M. J. Sherwood, for defendant township.

Alex. J. Groesbeck, Attorney General, and *Thomas G. Baillie*, Assistant Attorney General, for intervening defendant State boards.

Rees, Robinson & Petermann, for intervening defendant companies.

MOORE, J. This is a suit brought to recover a portion of taxes of 1915, paid under protest by the Baltic Mining Company. Before the trial the Copper Range Company became the owner of all of the assets of the Baltic Mining Company, and the demands in said suit were assigned to the Copper Range Company which was substituted as plaintiff. The St. Mary's Mineral Land Company and the South Range Mining Company intervened as defendants, as did the board of State tax commissioners and the State board of assessors. The case was tried before the court. From a judgment in favor of the defendant the case is brought here by writ of error.

The trial judge made findings of fact and conclusions of law. He also filed a long written opinion, which states the issues involved so clearly that we quote from it freely:

"This action was originally brought by the Baltic Mining Company to recover from the defendant, township of Adams, the sum of \$27,235.91 paid under protest as taxes to the treasurer of said township on the 10th day of January, 1916. The facts out of which the controversy grows are briefly as follows:

"At the spring election of the year 1915, Frederick W. Denton was elected supervisor of Adams town-

ship. During that year, and for at least ten years before, Mr. Denton was the general manager of the group of mines controlled by the Copper Range Company. The latter company owned substantially all of the stock of the said Baltic Mining Company, of the Trimountain Mining Company, and of the Copper Range Railroad Company. It also owned one-half of the capital stock of the Champion Copper Company. Mr. Denton, who claims he had made an elaborate investigation and series of calculations of the actual cash value of the Baltic Mining Company and of other mining properties, assessed the real estate thereof consisting of its mining property situated in the township of Adams, at the sum of \$2,900,000 and the real estate consisting of mining property of the Trimountain Mining Company, situated in the same township, at the sum of \$550,000. * * *

"When the committee on equalization met in the fall after carefully considering the matter, it recommended to the board of supervisors that the sum of \$2,600,000 be added to Adams township. A motion was thereupon made to the board of supervisors to adopt this report when a protest was made by other taxpayers of Adams township to the effect that as the value of the Copper Range properties had been undervalued, it would be unfair to saddle this \$2,600,000 on to Adams township as a whole and that they would suffer to the extent of about 20 per cent. in their valuations if this plan was pursued. At their request and upon the motion of Supervisor Seeber, the recommendation of the committee on equalization was laid on the table until an adjourned meeting to give such taxpayers an opportunity to present the whole matter to the board of State tax commissioners, which was the only authority that could specifically assess this amount against Copper Range properties.

"Thereupon such proceedings were had that on the 3d day of November, 1915, the State board of tax commissioners appeared in Houghton and gave a full hearing to this particular question—as stated in the language of Commissioner Kearney—'Whether these particular properties complained of in the township of Adams are on the assessment roll at their true cash value disregarding any system that the supervisor may have used in placing them there.'

"Mr. Denton presented his facts and figures at great length and defended his assessment in an able and exhaustive manner. Other parties interested were heard at length. The testimony and arguments were taken down stenographically. Mr. Denton left with the board all of his exhibits, containing carefully compiled and elaborate data tending to support his main conclusions. Mr. Rees presented an argument backed up by data tending to show that the stock market method employed by the supervisors for so many years had worked substantial justice and fairness in the valuation of mining properties. The board of State tax commissioners testify that before they decided the matter they waited for the proceedings at the hearing to be transcribed; that they gave the matter careful consideration both individually and as board, after which they unanimously decided to change the individual assessment of the Baltic Mining Company from the sum of \$2,900,000 to the sum of \$5,100,000, and the Trimountain Mining Company from the sum of \$550,000 to the sum of \$950,000, thus adding \$2,200,000 to the valuation of the Baltic Mining Company. Thereafter the board of supervisors met and equalized Adams township by adding to the total assessed valuation as fixed by the supervisor of the township the total sum of \$2,600,000 being the exact amount of the increase as fixed by the State board of tax commissioners.

"A petition for a hearing was thereafter filed by Mr. Denton as supervisor for Adams township complaining of the value fixed by the board of equalization as to Adams township, as to Calumet township and as to Osceola township, setting forth and condemning the method pursued by the committee on equalization in adopting stock market quotations as a basis of valuation. This petition was denied. So the taxes of the Baltic Mining Company claimed to be excessive were paid under protest and this action is brought to recover the same.

"Two propositions of fact are advanced by the plaintiff as a basis for a recovery in this case.

"(1) That the property of the Baltic Mining Company was grossly, arbitrarily, unlawfully and fraudulently placed upon the assessment roll by the State

board of tax commissioners at a sum largely in excess of its cash value.

"(2) That the property of the Calumet & Hecla Mining Company and of the Osceola Consolidated Mining Company was fraudulently placed upon the rolls of the townships of Calumet and Osceola, respectively, at sums away below the true cash values of said properties.

"I am unable to find any evidence in the record that the State board of tax commissioners acted hastily, carelessly or fraudulently in the matter of assessing the property of the Baltic Mining Company. There is no evidence that they did not use their best judgment. They gave due weight to the elaborate data and argument presented by Mr. Denton. Even if they found after carefully considering both methods of arriving at the true cash value of the Baltic Mining Company that the conclusions reached by considering the stock market quotations of the shares of the Copper Range Company as an element in the result is correct, Can a court say that they acted in bad faith? Can a court say that they did not exercise their best judgment? Did the tax commission adopt a fundamentally wrong principle? * * *

"But the committee on equalization did not blindly follow the stock market. They made what they considered reasonable deductions. They classified the mines. On the whole, if the matter was before me for decision as an assessing officer, I should consider that the stock market method of arriving at the true cash value of mining properties will in the long run prove more certain, just and equitable than any method based upon calculations founded upon data, a great deal of which is merely assumed to exist. If we were going to prove the true cash value of a piece of real estate we would inquire what similar real estate in the neighborhood was actually selling for or had sold for in the open market. * * *

"But it is said by the learned counsel for plaintiff that there was no way of applying the stock-market method of valuation to the Baltic property for the reason that its shares are not quoted on the exchange. The answer to this proposition is that if the stock-market method was not applied, then counsel has noth-

ing to complain of because the whole foundation of plaintiff's claim is that the true cash value cannot be determined by resorting to stock-market quotations. In fact in this particular instance not only was market quotations of the Copper Range Company considered, but also data derived from other sources. The process was about this: The market value of the entire Copper Range Company was ascertained by multiplying the total number of its shares by 52, the quotation on the 12th day of April, 1915. True cash value of the property was determined by figuring 72½ per cent. of this amount. From this sum was deducted the valuation of one-half Champion as assessed by Mr. Denton and also the valuation of the Copper Range Railroad, a subsidiary of the Copper Range Company, as assessed by the State board of assessors. The assessed value of certain real estate owned by the Copper Range Company was deducted and the balance was the proposed assessment of the Trimountain and Baltic companies to bring the total Copper Range proportion on a par with other mining properties. The total additional valuation was added to Trimountain and Baltic substantially in the proportions of their respective assessed valuations.

"So we see that the board of State tax commissioners made calculations based on ascertained data. They acted on evidence after a full hearing. They reached a unanimous conclusion as to the true cash value of the plaintiff's real estate. In my judgment, after carefully reading and studying all of the evidence presented to the commissioners, I not only cannot say that they recklessly or fraudulently placed an excessive valuation upon the mining property of the plaintiff, but, on other hand, it is my belief that they exercised sound judgment in reaching the result of which the plaintiff complains. It goes therefore, without saying, that far from showing any fraud or discrimination, the evidence shows that the commissioners acted honestly, independently and in the utmost good faith. Nor am I able to find that the State tax commissioners, in assessing the Baltic Mining Company, adopted a fundamentally wrong principle. On the contrary, the principle or system adopted was more likely to bring a fair and reasonable result than

any other system or principle brought to their attention.

"Complaint is also made by the plaintiff of a gross undervaluation of the Calumet & Hecla and of the Osceola mines by the supervisors of Calumet and Osceola townships in the spring of 1915. In determining the true cash value of the Osceola Consolidated Mining Company the stock market value of its shares was used as an element in the calculation precisely as was done in assessing other mining properties. In assessing the Calumet & Hecla property the stock market value of the Calumet & Hecla Mining Company was considered as a basis of the calculation of the true cash value of its real estate in the same way. To ascertain the value of its real estate in Calumet township there was deducted from the stock market value of the company its holdings of stock in other Michigan mining companies whose property was assessed elsewhere; the value of its real estate in other townships and its personal property holdings. After making those deductions, all of which were proper in order to avoid double taxation, the supervisor assessed 72½ per cent. of the balance against the Calumet & Hecla. While Mr. James MacNaughton, the supervisor, was also the general manager of the Calumet & Hecla Mining Company, he did not attempt to devise any different system for determining the value of the mining properties in which he was interested than the one which had been in vogue when he first became supervisor. So it follows that the Calumet & Hecla property was assessed at a reasonable percentage of the value that was placed upon the property by those who in the open market were buying undivided interests in it represented by shares of its common stock.

* * *

"So when we consider how honest and fair-minded men may differ about the factors that should be considered in placing a valuation on a mining property, Can we say that a supervisor who takes for a substantial element in his data the evidence of actual sales of its stock in the open market is acting arbitrarily and unjust? Isn't it more disinterested than it would have been had he worked out his own method of valuation? If every one of the supervisors in Houghton county should adopt his own method of determining

the mining property for assessing purposes, there would be no uniformity in results. We would have a sort of Dutch auction, in which every supervisor interested as manager of a mining company would be obliged to reduce the assessment on his mines so as not to be outdone by the other fellow. And if the necessity should exist I don't think that our mine managers would have any difficulty in supplying a line of figures that would wring tears from the eyes of a mummy.

"So I conclude, as a matter of fact, there is no evidence of undervaluation of either the Calumet & Hecla or of the Osceola properties.

"But even if there has been an error of judgment either by the tax commission in its assessment of the Baltic Mining Company's property or by the supervisors of Calumet and Osceola townships in their valuations of the Calumet & Hecla and Osceola properties, this fact of itself would afford no basis for recovery in this action. There must be some evidence of an intentional violation of duty on the part of the assessing officers, or such reckless disregard of a taxpayer's manifest rights as would reasonably lead to an inference of intentional inequality or of a clear adoption of a fundamentally wrong principle before an assessment can be declared void.

"In the briefs of counsel I find no dispute about the legal principle governing in actions of this kind. In this State it has been frequently held that before a court is justified in holding a tax to be illegal because the supervisor or the board of review acted fraudulently, that fact should be clearly shown by the evidence. *Story & Clark Piano Co. v. Hilderink*, 189 Mich. 131, citing a great number of cases, including *Pioneer Iron Co. v. City of Negaunee*, 116 Mich. 430; *Aurora Iron Mining Co. v. City of Ironwood*, 119 Mich. 325; *Island Mill Lumber Co. v. City of Alpena*, 176 Mich. 575.

"The Supreme Court of this State has held in *City of Muskegon v. Boyce*, 123 Mich. 539, that the mere fact that some of the property upon the assessment roll was undervalued or that taxable property was omitted from the roll, was insufficient to invalidate the assessment; but to have that effect it must also

be made to appear that action on the part of the assessing officers was intentional and that the person complaining was thereby compelled to pay more than his just portion of taxes. *Story & Clark Piano Co. v. Hilderink*, 189 Mich. 134.

"There are cases in this State where relief has been granted, but they are cases in which the taxpayer was held justly to complain and where there was a studied effort or combination on the part of the assessing officer to shift taxation from one class to another and where the officers designedly discriminated against certain property owners in favor of others, or where large amounts and values of property were designedly left off the roll. Some of these cases are the following: *Merrill v. Humphrey*, 24 Mich. 170; *Walsh v. King*, 74 Mich. 350; *Solomon v. Township of Oscoda*, 77 Mich. 365; *Auditor General v. Jenkinson*, 90 Mich. 523; *Auditor General v. Prescott*, 94 Mich. 190; *Auditor General v. Pioneer Iron Co.*, 123 Mich. 521; *Fletcher Paper Co. v. City of Alpena*, 160 Mich. 462.

"The foregoing rules governing the legality or illegality of assessing officers in general are also applied by courts in considering the action of the State board of tax commissioners. In a suit to declare void assessments, the court will not consider complaints as to the results reached by the State board of assessors except those based on fraud or an adoption of a fundamentally wrong principle. *Chicago, etc., R. Co. v. Babcock*, 204 U. S. 585 (27 Sup. Ct. Rep. 326), citing as the foundation of this principle the opinion of our Supreme Court in *Newport Mining Co. v. City of Ironwood*, 185 Mich. 685.

"In *Chicago, etc., R. Co. v. Babcock*, *supra*, the court says:

"Within its jurisdiction, except as we have said, in the case of fraud or clearly shown adoption of wrong principles, it [that is the State board] is the ultimate guardian of certain rights.'

"If the State board of tax commissioners acted fairly, honestly and justly towards the plaintiff in arriving at their conclusion, there is nothing to justify the court in setting aside the action of the board. *Newport Mining Co. v. City of Ironwood*, 185 Mich. 692; *Sunday Lake Iron Co. v. Township of Wake-*

field, 186 Mich. 631. The ascertainment of the value of taxable property is judicial and requires the judgment of the assessor upon his official oath. *Wall v. Trumbull*, 16 Mich. 228; *Woodman v. Auditor General*, 52 Mich. 28. The same may be said of the action of the board of review. * * * If they act in good faith and exercise their best judgment, mere errors in judgments will not defeat their action. * * * The burden of proof is on the complainants to sustain the charges of unfairness and fraud by a fair preponderance. *Pioneer Iron Co. v. City of Negaunee*, 116 Mich. 435.

"Viewing the case as a whole and having regard to the foregoing principles, I am unable to find in the action of any of the assessing officers whose action is questioned herein or of the board of tax commissioners any evidence of fraud or unfairness or of any effort to shift taxation from one mining property to another. * * *

"Judgment for the defendant township will be entered, with costs to be taxed."

We have, with the appendix containing many exhibits, a long record. We have carefully prepared briefs by able counsel. We have gone over these with care. We think it would profit no one to go into details of the record. The questions involved are not new in this State. We agree with the trial judge in his statement:

"I am unable to find the action of any of the assessing officers whose action is questioned herein, or of the board of tax commissioners any evidence of fraud or unfairness, or of any effort to shift taxation from one mining property to another."

The authorities cited by the learned judge are controlling of the law of the case.

The judgment is affirmed with costs to the defendant.

BIRD, C. J., and SHARPE, STEERE, BROOKE, and KUHN, JJ., concurred. FELLOWS and STONE, JJ., did not sit.

EBERT v. CORNING.

MORTGAGES—PAYMENT—EVIDENCE—SUFFICIENCY.

On a bill for the discharge of two mortgages, the finding of the court below that the debt of plaintiff represented by said mortgages was paid in full, *held*, supported by the record.

Appeal from Huron; Beach (Watson), J. Submitted October 17, 1919. (Docket No. 62.) Decided December 22, 1919.

Bill by Caroline Ebert against Anna Corning, executrix of the last will of William Corning, deceased, for the discharge of certain mortgages. Defendant filed a cross-bill for a reformation of said mortgages and to foreclose the same. From a decree for plaintiff, defendant appeals. Affirmed.

George M. Clark, for plaintiff.

G. W. Davis, for defendant.

MOORE, J. We quote from the brief of the solicitor for the appellant in this case:

"Plaintiff filed a bill of complaint to obtain a decree discharging two mortgages given by her to the estate of William Corning, on or about the 26th day of April, 1904, for \$2,900 and \$1,000 respectively, and in her bill of complaint she alleges that she is entitled to the penalty of \$100 provided for by the statute, on failure to discharge mortgages after payment. The trial court in its first decree awarded such penalty, but subsequently omitted it. Defendant answered, and in her answer in the nature of a cross-bill, prayed the reformation of said two mortgages and also the foreclosure thereof. The real controversy arises concerning interest unpaid by the plaintiff on two other mortgages given by the plaintiff to William Corning,

the principal and interest of which to the date of the making of said mortgages of April 26th, 1904, were to be included therein. The first of the old mortgages dated the 24th day of January, 1883, was due October 1st, 1884, and was for \$200 with interest at eight per cent. per annum, payable April 1st and October 1st of each year, with exchange on New York, and ten per cent. payable on the 1st day of April and October each year, after maturity of the mortgage until paid.

* * * The second of the old mortgages was for \$700, dated October 1st, 1883, due October 1st, 1886, with the time for the payment of interest and the rate of interest the same as the \$200 mortgage. * * *

"The defendant properly makes claim for the unpaid interest upon the two old mortgages, and that the same should have been included in the new mortgages. She contends that: It was agreed between the plaintiff and the defendant that the amount of the two old mortgages and the unpaid interest thereon should be included in and as a part of the moneys, the payment of which was to be secured by the new mortgages. * * *

"That the amount of the interest due and unpaid upon the two old mortgages in April, 1904, when the two new mortgages were given, was \$616.30. That \$100 of the new loan was not included in the new mortgages. * * * That the said new mortgages should be reformed so as to include the amount of the interest upon the two old mortgages and the said \$100 of the new loan, and that decree should be entered for the foreclosure thereof, if the same is not paid."

It was the claim of the plaintiff that her debt represented by all the mortgages was paid in full, and the trial judge so found. The case is brought here by appeal.

The two last-named mortgages were payable at the Second National Bank of Saginaw. The decisive questions in the case are questions of fact. The testimony covers nearly one hundred pages of printed record. It is conflicting. We have already stated where the mortgages were payable.

In the record appears the following:

"May 27th, 1909.

"MR. JOHN RYAN, Cashier,

"Bad Axe, Mich.

"*Dear Sir:* We have received your letter of the 26th inst. inclosing draft for \$3,919.50 to pay two mortgages given by Caroline Ebert to Anna Corning and Edward Corning, executors of the estate of William Corning, deceased.

"We have notified Miss Corning and requested her to forward discharges of these mortgages.

"Yours very truly,

"EDWARD W. GLYNN, Cashier."

Mr. Glynn was the cashier of the Second National Bank of Saginaw. His deposition was taken and offered in evidence on the part of the defendant. In it appears the following:

"Q. Do you remember of two mortgages being given by Mrs. Ebert in 1904 to the Corning estate?

"A. There are two mortgages under date of April 26, 1904, one for \$2,900 and one for \$1,000. On May 26, 1909, we received a letter enclosing a draft for \$3,919.50 in payment of the two mortgages, in favor of Anna and Edward Corning, executors of the estate of William Corning, deceased. One of \$2,900, recorded in liber 69 of mortgages, page 526, recorded May 31, 1904, the other mortgage of \$1,000, recorded in liber 75, page 430, on June 7, 1904. A memorandum on the letter in the files, shows we wrote to Anna Corning, May 27, 1909, and in the files is a letter from her in 1910, referring to the Caroline Ebert mortgages, in which she complains that there was a mistake in the amount due, and that she had written Mrs. Ebert and called her attention to it, and that she had not questioned it, and that she had seen Mrs. Ebert personally and rendered her a statement, and that she had supposed that when she wanted the discharge, she would adjust the matter.

"Q. Has there been any interest paid on those two mortgages since the deposit of that \$3,919.50?

"A. It appears that there has been none paid."

An examination of the entire record convinces us

that the plaintiff has shown by a decided preponderance of the evidence that the averments of her bill of complaint are true.

The decree is affirmed with costs to the plaintiff.

BIRD, C. J., and SHARPE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

ROMEO v. LUPO.

LANDLORD AND TENANT—SUMMARY PROCEEDINGS FOR NONPAYMENT OF RENT—TENDER OF AMOUNT DUE.

In summary proceedings for the possession of a store building for nonpayment of rent, where defendants tendered into court the amount due, with costs, in compliance with 3 Comp. Laws 1915, § 13253, as amended by section 25, Act No. 243, Pub. Acts 1917, they were entitled to retain possession, and a judgment of restitution is reversed.

Error to Bay; Houghton (Samuel G.), J. Submitted October 31, 1919. (Docket No. 68.) Decided December 22, 1919.

Summary proceedings by Joseph Romeo against Mathew Lupo and another for the possession of a store building. There was judgment of restitution before the commissioner, and defendants appealed to the circuit court. Judgment for plaintiff. Defendants bring error. Reversed, and no new trial ordered.

Kinnane, Black & Leibrand, for appellants.

Hitchcock & Allison, for appellee.

MOORE, J. This controversy involves the possession of a store building. It was owned by Mr. Clark and his wife, who on August 20, 1913, leased it to plaintiff for a term of 10 years for a rental of \$20 per month, payable monthly in advance. On January 2, 1918, plaintiff assigned this lease to defendants for the remainder of the term. Defendants were to continue to pay to the Clarks the \$20 per month and were to pay \$10 per month in addition to plaintiff. The assignment was silent as to the time of the month the \$10 was due. The defendants went into possession. A controversy arose as to the payment of one month's rent. On June 5, 1918, plaintiff served on Mathew Lupo, one of the defendants, a notice, and later commenced a suit by the usual complaint in summary proceedings, to which the defendants pleaded not guilty. The case was tried before the circuit court commissioner, on July 15, 1918. Defendant tendered and paid into court \$20. The commissioner entered a judgment of restitution and found that there was owing plaintiff by defendants \$30 for rent. The defendants appealed to the circuit court. Defendants, before trial in the circuit court, paid an additional \$40 into court to cover the rent which had accrued since the trial before the circuit court commissioner, making a total tender of \$60 which was refused by the plaintiff.

At the close of plaintiff's case, defendants moved for a directed verdict, which motion was overruled. The jury returned a verdict that one of the defendants was guilty of withholding the premises, and that there was \$60 rent due in addition to \$15.20 costs, for which plaintiff might have execution, and also a writ of restitution for the possession of the premises. Some correspondence occurred and defendants tendered the amount of costs in addition to the previous tender, which had been kept good. The court later ordered that the writ of restitution issue, and the case is brought here by writ of error.

Many errors are assigned but we shall consider but one of them.

We think the case comes within the provisions of section 25 of Act No. 243 of the Public Acts of 1917. A similar provision has been construed by this court, *Lambton Loan & Investment Co. v. Adams*, 132 Mich. 350, where Justice GRANT, speaking for the court, said:

"He who seeks possession for violation of a lease or contract of sale for nonpayment of money due thereunder takes the remedy subject to the conditions imposed by the statute. The statute was designed to provide a speedy and summary remedy for obtaining possession of lands held over contrary to these agreements, and in doing so it also sought to give the lessee or vendee another opportunity to retain the benefit of his contract by payments within five days, where the failure to pay was his sole default."

The judgment is reversed, with costs, and no new trial ordered.

BIRD, C. J., and STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred. SHARPE, J., did not sit.

BECKOVSKY v. BURTON ABSTRACT & TITLE CO.

1. ABSTRACTS OF TITLE—DEFECTIVE ABSTRACT—EXPRESS CONTRACT—QUESTION FOR JURY.

In an action against an abstract company for damages growing out of the alleged negligent failure of the defendant, in extending and certifying an abstract, to show a certain incumbrance upon a piece of property plaintiff was about to purchase, testimony on the part of plaintiff, *held*, suffi-

cient to carry the question to the jury as to whether an express contract was made between plaintiff and defendant.

2. SAME—PAYMENT—PRIVITY OF CONTRACT.

In such action, if defendant's agent was advised, when the abstracts were left with him for extension and certification, that the services were to be rendered to plaintiff but were to be paid for by the vendors, and acquiesced therein, it is unimportant whether payment was made or not, there being privity of contract.

3. SAME—DEFECT—NOTICE—EVIDENCE—SUFFICIENCY.

Evidence *held*, insufficient to put plaintiff upon inquiry as to the mortgage in question.

4. SAME—PARTY DAMAGED.

There is no merit in defendant's contention that plaintiff was not the party who suffered damage because title to the property was taken in the name of his wife, where the declaration charged that plaintiff was the one purchasing the property and a copy of a quitclaim deed from his wife to him was attached thereto and made a part thereof, and the proofs showed conclusively that the entire consideration passed from him to the vendors.

5. SAME—DAMAGES—RELIANCE UPON DEFECTIVE ABSTRACT.

Where plaintiff, prior to receiving the defective abstracts sued upon, paid certain sums to the vendors on the purchase price, he is not entitled to have those amounts included in his damages, since they were not paid in reliance upon said abstracts.

6. SAME.

The argument of plaintiff that he should recover the full amount paid because after he received the abstracts he parted with the title to his own property, *held*, fallacious, since he received property of an equal value at that time.

7. SAME—EXCESSIVE DAMAGES.

The verdict for plaintiff, *held*, not excessive by the amount of certain notes of the vendors surrendered by plaintiff in reliance upon said abstract as part of the purchase price because soon thereafter said vendors became insolvent, where, so far as the record discloses, the notes at the time of their surrender were good and collectible.

For authorities passing upon the question of liability of title abstractors generally, see notes in 12 L. R. A. (N. S.) 449; 26 L. R. A. (N. S.) 1207; 42 L. R. A. (N. S.) 176, and L. R. A. 1916D, 826.

Error to Wayne; Hunt (Ormond F.), J. Submitted October 31, 1919. (Docket No. 101.) Decided December 22, 1919. Reargued April 28, 1920. Former opinion affirmed June 18, 1920.

Assumpsit by Morris Beckovsky against the Burton Abstract & Title Company for negligence in extending and certifying an abstract. Judgment for plaintiff. Defendant brings error. Affirmed conditionally.

Campbell, Dewey & Stanton (Henry M. Campbell, of counsel), for appellant.

Keena, Lightner, Oxtoby & Hanley and *Beckenstein & Weininger*, for appellee.

This action is brought by plaintiff against defendant for the purpose of recovering damages growing out of the alleged negligent failure of the defendant in extending and certifying an abstract to show a certain incumbrance for \$15,000 upon a piece of property plaintiff was about to buy. The declaration in its first count alleged an express contract between plaintiff and defendant relative to the certification of the abstract and inasmuch as the case went to the jury upon the allegations contained in this count alone, consideration of the other two counts is unnecessary. The plea was the general issue with notice of certain defenses thereunder unimportant so far as this review is concerned. The mortgage lien not noted upon the abstract had been foreclosed before the suit was brought. The final decree in the foreclosure case fixed the amount due at \$15,647.50; that sum plus interest to the day of the trial, \$339, amounted to \$15,986.50, for which sum plaintiff had judgment. Defendant now reviews the case in this court under 20 assignments of error.

BROOKE, J. (*after stating the facts*). 1. It is first asserted in behalf of the defendant that in cases of this kind the relationship between the parties is contractual and the action is not based upon tort. A leading case upon the question involved is *Savings Bank v. Ward*, 100 U. S. 195, where it is held that proof of employment is a prerequisite to maintenance of the action. This decision has been followed in *Harshman v. Winterbottom*, 123 U. S. 215 (8 Sup. Ct. Rep. 98) ; *Waters-Pierce Co. v. Deselms*, 212 U. S. 159 (29 Sup. Ct. Rep. 270) ; *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220 (33 Sup. Ct. Rep. 32, 42 L. R. A. [N. S.] 1000). See, also, *Mallory v. Ferguson*, 50 Kan. 685 (32 Pac. 410, 22 L. R. A. 99) ; *Zweigardt v. Birdseye*, 57 Mo. App. 462 ; *Schade v. Gehner*, 133 Mo. 252 (34 S. W. 576) ; *Equitable Building & Loan Ass'n v. Trust Co.*, 118 Tenn. 678 (102 S. W. 901, 12 L. R. A. [N. S.] 449, 12 Ann. Cas. 407) ; *Thomas v. Trust Co.*, 81 Ohio St. 432 (91 N. E. 183, 26 L. R. A. [N. S.] 1210). Upon this point the court charged the jury as follows:

"I charge you that in order for the plaintiff to recover in this case, he must establish to your satisfaction that a contract relation existed between plaintiff, Beckovsky, and the defendant, the Burton Abstract & Title Company, under which and by reason of which the plaintiff had certain rights and the defendant certain obligations to perform with reference to the plaintiff. In other words, this contract relation which the plaintiff claims, must have been suggested that he, the plaintiff, had a right to rely upon this alleged contract, and the defendant had certain duties with reference to the plaintiff, and those duties he must have performed in the manner as I shall hereafter more in detail instruct you."

In this court defendant asserts:

"The plaintiff elected to go to the jury upon that count in the declaration charging an express contract. It is submitted that there is not a scintilla of

evidence in the case showing an express contract between this plaintiff and defendant."

In the light of this assertion and the charge of the court upon the question it is necessary to examine the evidence touching the question. It appears that on October 12, 1917, plaintiff had arranged an exchange of his property with Victor & Lipshitz. Plaintiff's property was valued at \$40,000 subject to a mortgage of \$13,000 and Victor & Lipshitz's property was valued at \$75,000 subject to a mortgage of \$35,000, the agreed net values of the two properties being respectively \$27,000 for plaintiff's and \$40,000 for that of Victor & Lipshitz. The difference of \$13,000 was to be paid by plaintiff to Victor & Lipshitz, \$9,000 in cash and the balance, \$4,000, by the surrender of the notes for that amount held by plaintiff against Victor & Lipshitz. Two or three days later, plaintiff went to the office of Victor & Lipshitz, when, according to the plaintiff's testimony, the following occurred:

"Q. What took place in their office?

"A. I asked for the abstracts. I saw Victor give me the abstracts and he told me 'Here is your abstracts,' is the way he explained it. Then he tells me I should go and certify it. I told him, 'Would there be any difference if Miller go with me, or let him go with me?' He gave him the abstracts and I asked him, Mr. Miller, if he would go with me. So, on the way I asked him about that deal because he was collecting the rents and asked his information about the tenants and if it was true whatever it brings in. We went to the Burton Company with the abstracts for examination of the title. When I purchased real estate before I had the abstract certified to date and I would not have closed this deal until I had the abstracts examined by my attorney.

"Q. What took place when you went over to the Burton Company office?

"A. We went over and Mr. Miller handed the abstracts through the window. A young lady was sitting there and she asked 'What name?' and he told

her that this fellow, Mr. Beckovsky, bought the property and he said, 'I believe he wants to give it in in the name of Victor & Lipshitz because we have to pay the bill.' I says, 'Yes, that is what I want. I want you to certify the abstracts and I want you to charge the bill to Victor & Lipshitz.'

"Q. Who did you say that to?

"A. I said it to the young lady who took the abstracts. Mr. Miller handed the abstracts to the young lady behind the counter. There were three or four windows in this counter. The abstracts were handed in through the 'Order' window. This was about the 16th or 17th of October. A young man asked, 'Do you want them in a rush?' I told him, 'No, it is in no hurry about it.' The young man addressed his questions to both of us. He was not standing by the girls when we gave the order in. He just stepped in."

On cross-examination plaintiff testified:

"A. Yes, sir. Well, when me and Mr. Miller went to Mr. Burton's office, we went there to the window and we handed the abstracts, and the young man asked him which name to certify the abstracts and he said 'This gentleman here, Beckovsky, bought the property and I think he wants to give it in the name of Victor & Lipshitz, because it is up to them to pay the bill—up to us to pay the bill.'

"Q. He said, 'It was up to us to pay the bill'?

"A. Yes. I said, 'I want you to certify the abstracts for me and charge the bill to Victor & Lipshitz.'

"Q. State whether or not it is a fact that Mr. Victor asked Mr. Miller, in your presence, to take these abstracts and—over and have them signed up?

"A. I believe Mr. Victor told me to take the abstracts. That is the way I recall it."

Assuming the truth of plaintiff's testimony, we are of opinion that the language:

"I want you to certify the abstracts and I want you to charge the bill to Victor & Lipshitz,"

—and—

"I want you to certify the abstracts for me and charge the bill to Victor & Lipshitz."

—is sufficient to carry the question to the jury as to whether an express contract was made between plaintiff and defendant. The jury by its verdict determined that the contract was made as testified to by plaintiff.

2. It is next urged that under the testimony of the plaintiff the contract was plainly between Victor & Lipshitz and defendant and that therefore plaintiff being a stranger to the contract and not furnishing any part of the consideration he cannot recover. A sufficient answer to this contention is found in what we have said, *supra*.

3. The next point argued in appellant's brief is that inasmuch as there was no proof of payment of the amount charged by defendant for the certification of the several abstracts, plaintiff may not recover, citing 13 Corpus Juris, p. 367. If defendant's agent was advised when the abstracts were left with him for extension and certification that the services were to be rendered to plaintiff but were to be paid for by Victor & Lipshitz, and acquiesced therein, it seems to us that it is unimportant whether payment was made or not. It was said in the case of *Monaghan v. Insurance Co.*, 53 Mich. 238:

"But whenever there is a privity of contract between the plaintiff and the defendant, as when the promise is made directly to the plaintiff, although the consideration for the promise proceeds from a stranger, the defendant is liable to the plaintiff in an action upon the contract because of such privity."

See, also, *Palmer v. Bray*, 136 Mich. 85.

4. As outlined in his brief defendant's fourth position is that:

"At the time the deal was being closed, plaintiff had notice of outstanding papers affecting the title. Being so notified he proceeded thereafter at his peril and subject to any outstanding claims."

While it is true plaintiff testified:

"After they executed the deed Mr. Victor asked I should hold it over for a day or two because he said, 'I have some outstanding papers which I have got to take care of,' * * * He said: 'That is nothing, I will take care of it within a day or two.'"

We are of opinion that this was not sufficient to put plaintiff upon inquiry as to the \$15,000 mortgage. The case of *Roberts v. Abstract Co.*, 63 Iowa, 76 (18 N. W. 702), cited by appellant, appears to be inapplicable because in that case the plaintiff knew of the defect in the abstract in time to have prevented the loss had he acted promptly.

5. "The plaintiff was not the party who suffered damage." This claim is based upon the fact that the title to the property of Victor & Lipshitz was taken by plaintiff in the name of his wife. The declaration, however, charges that plaintiff was the one purchasing the property and alleges that in order that the record might conform to the facts he had taken a quit-claim deed from his wife, a copy of which was attached to and made a part of the declaration. Furthermore, the proofs show conclusively that the entire consideration passed from plaintiff to Victor & Lipshitz. There is no merit in the contention.

6. "The damages are excessive." It is agreed in briefs of counsel that the certified abstracts were delivered to plaintiff on October 28th. It is therefore certain that plaintiff could not have relied upon said abstracts prior to that time. He testified:

"This agreement was signed on October 12th, 1917, by myself, Nathaniel Victor and Harry Lipshitz. At the time of the execution of the agreement, I paid over to them \$1,000. and a few days later, on October 15th, 1917, I gave them \$3,500. About a week later I gave two cashier's checks on a bank in Birmingham, Michigan, for about a thousand dollars and cash, making up \$1,500 paid at that time."

We therefore find that by October 22d or six days prior to the day on which plaintiff received the abstracts in question he had paid to Victor & Lipshitz the sum of \$6,000. Upon this question defendant requested the court to charge as follows:

"The undisputed evidence in this case shows that before plaintiff received the abstracts, he had paid to Victor & Lipshitz, the sum, at least, of four thousand, five hundred dollars, and defendant claims that fifteen hundred dollars more was also paid by plaintiff before the abstracts were delivered to him. You are instructed that such sums as you find were paid by plaintiff before the abstracts were received by him should be deducted from the amount of the fifteen thousand dollar-mortgage and interest up to on or about December 3d, 1917."

The request was apparently covered in the charge in the following language:

"I charge you, as a matter of law that the defendant is not liable to the plaintiff for anything which the plaintiff did or did not do until the abstract was furnished and delivered and was in the hands of plaintiff. In other words, whatever he then did or did not do could not have been by reason of the default of the defendant, because not having this abstract back from the defendant, whatever he did, he did upon his own volition so far as the defendant is concerned. So, gentlemen of the jury, you will not take into any consideration that the defendant is liable in any respect for anything that he did or did not do preceding the time when the plaintiff received back the abstract as prepared and certified by the defendant. I think you understand that proposition. Did the plaintiff suffer any damages by reason of the reliance upon the abstract? You are only to take into consideration what he did or did not do after he received the abstract, because he could not have relied upon something he did not have. Then, you will eliminate, as I said, what he did or did not do up to that time. That is, if you pass the first two questions in favor of the plaintiff."

But the court continued:

"Now, there are at least three different theories of damages in this case. It is claimed by plaintiff that the deed which he made to Victor & Lipshitz was made after he received the abstract back, had an examination made, and that he did that in reliance upon the abstract—upon its correctness and validity. You can take that into consideration if you find that he did deed his property in reliance upon the abstract. And all other things that happened thereafter that he did, if you find that he did them in reliance upon it, you may consider them in making up your items of the damage which the plaintiff suffered, if any.

"Finally, the plaintiff asked the court to instruct the jury that in any event that if plaintiff is entitled to recover, that he is entitled to recover the amount of the decree which was entered in the circuit court for the county of Wayne, in chancery, on the 8th of August, 1918. Now, it is conceded that that decree was for a certain amount. Before we reach that, however, gentlemen of the jury, it is the law that upon the discovery of the error by plaintiff it was his duty, being placed in that situation when he discovered the defect or error in the abstract, to use reasonable diligence and exercise reasonable exertion to save himself, if possible, from adverse consequences. The defendant is only liable for such damages which plaintiff could not himself have reasonably prevented or lessened. I think you understand that. In other words, if plaintiff discovered that there was an error he should at once, as far as a reasonable man could under the circumstances, do all that he could to save himself from the situation in which he was then placed. I am going to leave that as a matter of fact for you. Did the plaintiff when he discovered the error, exercise reasonable diligence and do all that a reasonable man should under the circumstances, to save himself from further loss? Do not take that from the court as being the impression that he had. If you do find that he used reasonable diligence and took reasonable steps and used reasonable exertion to save himself from further loss and if you further find that he could not thereafter have done anything to lessen the damages, mitigate the damages, it is manifest, gentlemen of

the jury, then and in that case only, that this decree of the court that was entered appears to be—now, I will leave that with you—appears to be the amount of damages which he has suffered. Understand that I do not say that that is conclusive, and it is a circumstance, gentlemen of the jury, that if he had not gone ahead with this deal, for you to say whether he would have ever deeded his property and received this other deed from Victor & Lipshitz of the property in exchange. It is reasonable to suppose that if the abstract was certified under the circumstances in this case and it did not disclose this lien or mortgage, plaintiff had a right to suppose there was no such lien of record, and it afterwards developed that there was—and you have heard all the testimony about this litigation, and of the efforts of both plaintiff and defendant to have it declared invalid—at any rate, a final decree was entered on or about the 8th day of August for \$15,647.50, and if plaintiff is going to have that property as he expected that he would have it, that is, free and clear from that, he must pay it.

“Now, gentlemen of the jury, the interest as I understand it, has been conceded or, at least there has been no objection made, that the interest on that from the date of the decree is \$339, and that the decree and interest to date is \$15,986.50. Now, that is what the plaintiff must pay as the testimony now stands in order to redeem the property from that lien.”

While the latter excerpt is not entirely clear we must regard it as an invitation or at least an authorization to the jury to allow plaintiff the full amount of the \$15,000-mortgage, interest and costs, entirely disregarding the fact that prior to the obtaining of the certified copies of the abstracts plaintiff had already parted with \$6,000. This is made clearer upon an examination of the motion for a new trial based in part upon this specific ground. The court denied the motion, saying:

“The reasons stated in defendant’s motion are seven in number, but the only question argued by counsel upon the hearing of the motion related to the question

of damages. Upon this question the court charged the jury at length and a repetition thereof would serve no useful purpose here. The court is of the opinion that in the charge to the jury, a more elaborate exposition on the general rule might have been given, but in the instant case, the court finds that such a general charge upon abstract propositions could not have aided the defendant, and being of the opinion that the charge as given safeguarded the rights of the defendant in all essential matters, the motion for new trial is hereby denied."

It is further urged on behalf of the defendant that the verdict is excessive by the amount of \$4,000 notes surrendered by plaintiff to Victor & Lipshitz at the time of the exchange of the papers on November 1st. This claim is based upon the fact that very soon thereafter Victor & Lipshitz became insolvent and it is urged that the notes were worthless. We do not believe this claim tenable. So far as this record discloses the notes at the time of their surrender were good and collectible. It seems quite clear, however, that the judgment against defendant is too great by the amount of \$6,000 and interest thereon, from the date of the payment to the day judgment was taken. Plaintiff's argument that he should recover the full sum of the judgment and interest because after he received the abstracts he parted with the title to his own property valued at \$27,000 is entirely fallacious because he got in exchange the property of Victor & Lipshitz of an equal value at that time. By reason of the defendant's default plaintiff is out on the entire transaction just the amount of the judgment in this court and from that amount must be deducted such sums as were paid by him before he received the abstracts because they were paid of his own volition, uninfluenced by the failure of the defendant to properly note upon the abstract the \$15,000-incumbrance.

If the sum of \$6,000 and interest as above stated is

remitted from the verdict the judgment will stand affirmed for the lesser sum. If not so remitted a new trial will be ordered. Appellant will recover costs in either case.

BIRD, C. J., and MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred. SHARPE, J., did not sit.

ON REHEARING.

BROOKE, J. After listening to a reargument upon the question of the measure of damages, and upon further consideration of that question, we are of opinion that the conclusion thereon reached in the original opinion herein is correct.

MOORE, C. J., and STEERE, FELLOWS, STONE, CLARK, BIRD, and SHARPE, JJ., concurred.

PEOPLE v. HASSELL.

1. APPEAL AND ERROR—QUESTIONS REVIEWABLE.

A point not raised in the trial court nor covered by an assignment of error will not be considered by this court.

2. INTOXICATING LIQUORS—CRIMINAL LAW—INTERPRETATION OF STATUTE.

The provisions of the statute (section 38, Act No. 338, Pub. Acts 1917) requiring the labeling of liquor in transit apply to all shipments of liquor by common carriers.

3. SAME—CONSIGNEE—POSSESSION BY DRAYMAN—OFFENSE.

In a prosecution for an offense under section 38, Act No. 338, Pub. Acts 1917, making it unlawful for any consignee of intoxicating liquors to receive or have in his possession any original package or packages containing intoxicating liquor unless said package is marked, etc., where defendant, a passenger, checked two trunks containing whisky of 44.48 per cent. alcoholic content, not marked in compliance with the statute, and at destination gave a drayman the checks, who obtained the trunks and transferred them to another depot, defendant was guilty of the offense, he being both consignor and consignee, and the possession of the drayman was the possession of defendant.

Exceptions before judgment from Oakland; Rockwell (Kleber P.), J. Submitted October 16, 1919. (Docket No. 107.) Decided December 22, 1919.

William F. Hassell was convicted of transporting intoxicating liquor in violation of Act No. 338, Pub. Acts 1917. Affirmed.

Pelton & McGee, for appellant.

Glenn C. Gillespie, Prosecuting Attorney, for the people.

Respondent was convicted of an offense under section 38 of Act No. 338, Pub. Acts 1917, which provides:

"It shall be unlawful for any consignee of intoxicating liquor to receive or have in his possession any original package or packages containing intoxicating liquor unless said package or packages containing such intoxicating liquor have printed thereon in a conspicuous place where it can be plainly seen and read, marked in large letters, the following:

"*First*, This package contains intoxicating liquors;

"*Second*, Name and address of consignor and consignee, and the quantity and kind of intoxicating liquor;

"*Third*, The specific purpose for which such liquors are to be used."

The facts about which there is no dispute appear to be as follows: On the morning of February 25, 1919, respondent checked two large sample trunks from Lansing to Pontiac, Michigan, upon presentation of a passenger ticket to the baggageman of the Grand Trunk railway at Lansing. Apparently respondent traveled on the same train upon which his trunks were carried. Shortly after his arrival in Pontiac respondent employed a drayman to transfer the two trunks from the Grand Trunk depot to the Detroit

United Railway freight station, giving to the drayman the two duplicate checks which corresponded with the two checks on the trunks and paying the drayman \$1 for his services. The trunks on arrival at Pontiac were discharging a liquid smelling of intoxicating liquor. A special officer of the Grand Trunk thereupon notified the sheriff's office in Pontiac. The trunks were delivered to the drayman upon surrender by him of the checks and were driven by the drayman to the Detroit United Railway station where respondent was arrested. In the meantime a search warrant had been issued. Respondent and the trunks were taken to the jail where, upon his refusal to tell what was in the trunks or unlock them, they were broken open and found to contain 72 quart bottles of whisky, analyzing 44.48 per cent. alcoholic content.

At the close of the people's case respondent moved for a directed verdict upon the grounds that it had not been shown that the liquors were being transported for the purpose of barter or sale; that there was no evidence that their ultimate destination was any place in the State of Michigan; that Act No. 338 of the Public Acts of 1917 was not intended to apply to liquors for private use; and because respondent was not a consignee within the meaning of the act. This motion was overruled, and respondent, having rested his case, a verdict of guilty was rendered by the jury under the direction of the court.

BROOKE, J. (*after stating the facts*). In this court respondent contends:

1. That there was no delivery of the trunks to him. A sufficient answer to this contention is found in the fact that the point was not raised in the trial court nor is there any assignment of error covering it in this court.

2. It is next urged on behalf of the respondent that

no evidence was offered by the people that the liquors were being transported for business or commercial use. Under this head it is argued that the seizure of the liquor in question could not be justified unless it was apparent that it was stored in a freight house or depot for the purpose of being sold, furnished or given away contrary to law. It is said that the purpose of Act No. 338 of the Public Acts of 1917,—

“was to control liquor that was being transported to points in the State of Michigan for the purpose of being sold, furnished or given away contrary to law; that is to say, it was to control liquor that was being dealt in as a business.”

We are unable to agree with this contention. The provisions of section 38 requiring the labeling of liquor in transit apply to all shipments of liquor by common carriers; it evidently having been within the contemplation of the legislature that lawful transportation might be had thereunder without offense to other provisions of the law.

3. Respondent's next contention is that the liquor must have arrived at its destination before any crime was committed, and in this connection it is said that the evidence discloses that the liquor was intercepted while en route and that there is no evidence touching the residence of respondent or the ultimate destination of the liquor. It is likewise urged that respondent was not the “consignee” of the liquor within the meaning of the act. The last two points will be treated together. We have no difficulty in concluding that as to this particular shipment respondent was both consignor and consignee. The act does not provide that the offense is complete only upon delivery of the liquor to the consignee or at its *destination*. The offense is complete when the consignee shall “receive or have in his possession” the unlawful package. That respondent received the liquor through the agency of

the drayman to whom he delivered the baggage checks by means of which the drayman secured possession of the trunks, seems too plain for argument, therefore the possession of the drayman was the possession of the respondent in contemplation of law.

The judgment is affirmed and the case remanded for further proceedings.

BIRD, C. J., and SHARPE, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

FELDMAN v. ZIMMERMAN.

1. CIRCUIT COURT COMMISSIONERS—APPEALS—TIME — JUSTICES OF THE PEACE—STATUTES.

The time within which appeals may be taken from circuit court commissioners, being the same as from justices' courts, under 3 Comp. Laws 1915, § 13252, is limited to five days by 3 Comp. Laws 1915, §§ 14402, 14403, 14406, and the circuit court has no discretionary power to allow an appeal after the expiration of that time except where an application is made for a delayed appeal under section 14408.

2. SAME—STATUTES—CONSTRUCTION—WRIT OF RESTITUTION.

Act No. 243, Pub. Acts 1917, amending 3 Comp. Laws 1915, § 13253, construed, and *held*, not to extend the time from 5 to 30 days within which an appeal might be taken from the judgment of the circuit court commissioner in the case of a proceeding upon an executory contract for the purchase of land, but that the legislative intent was to extend the time within which a writ of restitution might not be issued to 30 days.

Error to Wayne; Goff (John H.), J. Submitted October 22, 1919. (Docket No. 117.) Decided December 22, 1919.

. Summary proceedings by Samuel Feldman and another against Fred C. Zimmerman and another for the possession of certain real property. There was judgment of restitution, and defendants appealed to the circuit court. Judgment for defendants. Plaintiffs bring error. Reversed, and appeal dismissed.

William Friedman (Morris Garvett, of counsel), for appellants.

Rood & Visscher, for appellees.

BROOKE, J. A single controlling question was presented for determination upon this record. Plaintiffs, on March 12, 1919, brought suit before Samuel L. May, circuit court commissioner, to recover possession of certain premises described in the pleadings from said defendants. Judgment of restitution was rendered by said circuit court commissioner on March 28, 1919. An appeal was perfected by defendants and bond filed on April 25, 1919, 28 days subsequent to the date of judgment. The statute touching appeals from circuit court commissioners, 3 Comp. Laws 1915, § 13252, provides in part:

“Either party conceiving nimsel aggrieved by the determination or judgment of the commissioner, or other officer, made or rendered under the provisions of this chapter, may appeal therefrom to the circuit court for the same county, within the same time, in the same manner, and return may be compelled, and the same proceedings shall be thereon had, as near as may be, and with the like effect, as in cases of appeals from judgments rendered before justices of the peace, and costs shall be awarded and collected in the circuit court in the same manner.” * * *

208—Mich.—16.

The law relative to appeals from justices' courts, 3 Comp. Laws 1915, § 14402, provides:

"The party appealing under the provisions of the preceding section shall, within five days after the rendition of the judgment, present to the justice an affidavit made by himself, his agent, or attorney, before any person authorized to administer oaths, stating that such judgment is not in accordance with the rights of such party, as the person making such affidavit verily believes." * * *

Section 14403 provides:

"The party appealing under the provisions of the preceding section shall also, within five days after the rendition of the judgment, deliver to the justice a bond or recognizance to the adverse party, in conformity with the following provisions:" * * *

Section 14406 provides:

"The appellant shall, within the said five days, in addition to the making and filing of an affidavit and bond, pay to the justice the taxable costs of the prevailing party, together with the sum of one dollar for making his return to said appeal, and the further sum of three dollars as clerk and entry fee," etc.

Section 14408 provides that:

"Appeals may be authorized by the circuit court, or by the circuit judge at chambers, after the expiration of five days, when the party making the appeal has been prevented from taking the same by circumstances not under his control." * * *

We have repeatedly held that the circuit court has no discretionary power to allow appeals from justice's court after the expiration of 5 days provided by statute. Such right exists only where the party desiring a delayed appeal makes application under the provisions of section 14408, *supra*; *Anderson v. Wartenberg*, 196 Mich. 529, and cases cited.

In the case at bar no application for a delayed appeal was made. It is the contention of counsel for

defendants that their appeal was seasonably taken. Section 25, chapter 30, 3 Comp. Laws 1915, § 13253:

"No writ of restitution shall be issued under the provisions of this chapter, until the expiration of five days after the entry of judgment of restitution; and in case of an appeal within that time, no writ of restitution shall issue until such appeal be determined in the circuit court; and in case it is found that the plaintiff is entitled to the possession of the premises, in consequence of the nonpayment of a sum of money, no writ of restitution shall issue, if the defendant shall, within five days after final judgment, pay the amount so found due, and the amount of costs awarded to the said plaintiff."

By Act No. 243 of the Public Acts of 1917 said section was amended to read in part as follows:

"No writ of restitution shall be issued under the provisions of this chapter, until the expiration of five days, or in the case of a proceeding upon any executory contract for the purchase of real estate until the expiration of thirty days after the entry of judgment of restitution; and in case of an appeal within that time, no writ of restitution shall issue until such appeal be determined in the circuit court." * * *

Counsel for defendants insist that by this amendment the time during which a dissatisfied litigant may appeal from the judgment of the circuit court commissioner, "in the case of a proceeding upon any executory contract for the purchase of real estate," is extended from 5 to 30 days. We are unable to agree with this construction of the statute. It is to be noted that the preceding section 13252, 3 Comp. Laws 1915, (section 24, chapter 30) deals with the right and limitations on the right of appeal. The next section deals only with the question of when a writ of restitution may issue. By amendment it extends the time from 5 to 30 days within which such writ may not issue. The words "that time" in the concluding language,—

"and in case of an appeal within that time, no writ of restitution shall issue until such appeal be determined in the circuit court,"

should be construed to refer to the 5-day period instead of to the 30-day period. In other words, there is apparent no intention to change the section relative to appeals but it was the legislative intent in cases of proceedings upon executory contracts for the purchase of real estate to extend the period within which a writ of restitution might not be issued to 30 days.

Upon the trial the plaintiff moved to dismiss the appeal because not seasonably taken, excepted to the overruling of said motion and assigned error upon the action of the court thereon.

The judgment is reversed and the appeal from the circuit court commissioner to the circuit court is dismissed.

BIRD, C. J., and SHARPE, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

FREEMAN v. HOAG.

1. APPEAL AND ERROR—REQUESTS TO CHARGE—DIRECTED VERDICT.

Where the testimony was in dispute, the trial court was not in error in refusing requests to charge which amounted to a directed verdict.

2. CONTRACTS—RELEASE—CONSIDERATION—SUFFICIENCY.

The promise of plaintiff to release defendant from his obligation on a contract to pay plaintiff part of the proceeds of a note made by third parties to defendant if he would

indorse another note of the makers for \$1,000, thus releasing security in which plaintiff had an interest, *held*, supported by a sufficient consideration.

3. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—ADMISSIBILITY.

Where plaintiff's motion for a new trial on the ground of newly-discovered evidence was supported by an affidavit that, after the date of the alleged agreement releasing defendant from his obligation to pay plaintiff, defendant stated to affiant that he wanted to borrow money to pay up plaintiff, *held*, that the trial court was in error in concluding that such testimony was inadmissible as tending to show a compromise, since affiant apparently had no knowledge of such effort, if any was being made, and that under the facts of this case a new trial should have been granted.

Error to Washtenaw; Sample (George W.), J. Submitted October 14, 1919. (Docket No. 39.) Decided December 22, 1919.

Case by Amariah F. Freeman against Egbert G. Hoag for a breach of a contract for the division of the proceeds of a promissory note. Judgment for defendant. Plaintiff brings error. Reversed.

A. F. Freeman (Frank B. DeVine, of counsel), in pro. per.

Cavanaugh & Burke, for appellee.

Plaintiff brought suit against defendant to recover for an alleged breach of a written contract bearing date October 12, 1914. After reciting that Homer C. Millen and May Millen had executed a note in the sum of \$3,000 dated September 23, 1914, payable on or before April 1, 1915, to defendant Hoag, the contract provided:

"That from the moneys realized or paid in on said \$3,000-note to the amount of \$1,737.34 the same shall first belong and be payable to said Hoag for that amount.

"That all sums realized and paid in on said \$3,000-note when paid in full, over and above said \$1,737.34, shall belong to and be divided equally or share and share alike, between said Hoag and said Freeman, and that said Freeman's ownership in said note and chattel mortgage, notwithstanding same is in the name of said Hoag, shall be in that proportion and in that amount as it may figure when the whole amount payable is paid, but that if any less sum is paid than the whole of such note through a proposed compromise or settlement at a lesser amount, then such shall first have the approval of said Freeman; but that if full payment is not realized or paid and no compromise amount is then effected as payment and it shall become necessary to realize on such note to force collection and foreclose said chattel mortgage and to realize further or attempt to from the decree or the results of said chancery suit, or in these securities, and a lesser amount results and is realized than the full amount of such note, said Freeman shall be entitled to all amounts over and above the said \$1,737.34 to the extent of \$600 at least, or so much thereof as may be realized, and all above \$2,337.34, share and share alike as aforesaid."

The declaration in effect alleges full payment of said note by the Millens to defendant and the refusal of said defendant to account to plaintiff for his share thereof under the terms of the contract.

Under the plea of the general issue defendant does not deny the execution of the contract relied upon by plaintiff but alleges that defendant's liability thereunder has been fully paid and cancelled under the following circumstances:

"The said Millens named in said declaration and the said plaintiff desired to procure a loan from the bank of one thousand dollars, for the purpose of paying an indebtedness of the said Millen; that said plaintiff, Amariah F. Freeman, was interested financially in the payment of said indebtedness; that the said Millens and the said plaintiff, in order to obtain the loan of said one thousand dollars, found it necessary to obtain the signature of this defendant to a promis-

sory note given to said bank as security for said loan, that the said plaintiff, the said Amariah F. Freeman, came to this defendant and promised and agreed to and with this defendant that if he, the said defendant, would sign said note and thus enable the said Millens to procure a loan thereon from the bank of one thousand dollars, that in consideration of the defendant's so doing, he, the said plaintiff, the said Amariah F. Freeman, would release and discharge this defendant from any and all liability whatever resulting to this defendant under and by virtue of said writing, Exhibit A, attached to the declaration herein; that in consideration of the said promise and agreement of the said Freeman and for said consideration, this defendant signed said note to said bank and became liable to pay the same and remained liable thereon until said note was afterwards paid."

Upon the issue thus framed the parties went to trial. After a full hearing upon the merits, the court charged the jury that the plaintiff was entitled under the proofs to recover from defendant the sum of \$1,013.83 as his share under the contract, unless,—

"the defendant rebuts such cause and establishes by a preponderance of the evidence such a valid contract based upon a lawful consideration that plaintiff, Freeman, has given up and transferred his claim to the defendant, Hoag. And defendant, Hoag, has the burden of proof upon him to establish such a transfer by plaintiff, Freeman, to defendant, Hoag, and defendant, Hoag, must also satisfy you that Freeman has done that by the preponderance of the evidence."

The jury returned a verdict in favor of the defendant. Thereafter a motion for a new trial was made upon the following grounds:

1. Because of newly-discovered evidence.
2. Because of unwarranted and prejudicial conduct of counsel for defendant.
3. Because of the alleged erroneous refusal to instruct as requested.
4. Because the verdict was against the weight of the evidence.

The learned circuit judge who heard the case seems to have reached the conclusion under an opinion dated February 7, 1919, that a new trial should be granted upon the ground of newly-discovered evidence. We find, however, that by a later decision dated and filed February 24, 1919, a new trial was denied. Plaintiff now reviews a judgment of no cause of action in this court.

BROOKE, J. (*after stating the facts*). The first three assignments of error are based upon the alleged erroneous refusal of the court to give plaintiff's requests to charge as presented. An examination of those requests will show that they amounted to requests for a directed verdict in favor of the plaintiff. We are of opinion that they were properly refused. It would seem that if defendant, Hoag, indorsed the \$1,000-note of the Millens at the request of the plaintiff, who was interested in securing the money with which to settle with Sawyer, thus releasing stock held by Sawyer, a part of which went to plaintiff under a promise of plaintiff to release defendant from his obligations under the contract sued upon, a sufficient consideration would be made to appear.

Whether such an agreement was made was, in our opinion, a question of fact for the jury under proper instructions and, assuming it to have been such a question, we do not understand the instructions of the trial court are criticized by plaintiff's counsel.

The remaining important assignments of error refer to the denial of the motion for a new trial. Bearing upon the question of newly-discovered evidence, plaintiff introduced the affidavit of one Tallmadge to the effect that on or about September 13, 1918, defendant, Hoag, desired to make a loan; that in the course of negotiations,—

"he stated to this deponent that he wanted moneys to

pay to some other party, his partner as he expressed it, whose name he did not state, but who lived at Ann Arbor, who had certain interests and ownership in the said chattel mortgage and the said stock certificates so hypothecated as aforesaid, and that he wanted the said moneys of three hundred dollars (\$300) to pay off or buy off his partner or such other party thus interested jointly with him and so that he and the said Millen could deal with each other as they desired, for the said other party, his partner, at Ann Arbor, was vigorously insisting him, said Hoag, that said Hoag must proceed with the foreclosure under the said chattel mortgage and the said stock certificate and make collection of the debt that said Hoag and the other party, his partner, had jointly against the said Millens as aforesaid, and that he desired to obtain the three hundred dollars (\$300) to buy him off or pay him off as aforesaid, so that he would not have to crowd the Millens which he did not want to do at that time for some reason which he did not state."

In his first decision upon the motion the court held:

"I find that the newly-discovered evidence in this case, as set forth in the motion and affidavit, meets the requirements for a new trial as laid down by the courts. It is therefore ordered that a new trial be granted in the above-entitled cause."

After striking this decision from the files he dealt with the question as follows:

"The only remaining ground upon which plaintiff bases his motion for a new trial is that of newly-discovered evidence. I think this position is also untenable. The plaintiff attempted during the trial of the cause to introduce evidence showing that defendant offered to pay him \$300 for full discharge of the claim of more than \$1,000 involved in the suit. The testimony was rejected because it was an offer on the part of the defendant to compromise. The newly-discovered evidence which plaintiff wishes to introduce, is of one Tallmadge, and, in substance, that defendant in borrowing \$300, said that it was to pay to a certain party. I regard the proposed testimony as testimony tending to show further that the defendant was se-

curing money, if to pay the plaintiff at all, was to pay him as a compromise."

The significance of the alleged newly-discovered evidence, if introduced, is that it would or might convince the jury that defendant, Hoag, would not be borrowing money in September, 1918, to buy out plaintiff's interest if said interest had been extinguished by agreement at the time the \$1,000 Millens' promissory note was indorsed by defendant. We are of opinion that the court was in error in concluding that such evidence would have been inadmissible as tending to show a compromise between plaintiff and defendant. The witness, if examined, would apparently have no knowledge of such an effort, if any, being made on the part of defendant.

Touching upon the ground alleged in the motion for new trial that the verdict was against the great weight of the evidence, plaintiff points out that the \$1,000-note indorsed by defendant bore date July 1, 1916, and that in open court in a case wherein Homer C. and May Millen were plaintiffs and defendant, Hoag, was defendant in August, 1918, more than two years after his alleged release from obligation under the contract, defendant testified:

"Q. You were to put up the attorney fee?

"A. I was to look after certain investigations he was to make * * * we had to have the thing gone into pretty thoroughly and, of course, provide for him.

"Q. Did you advance money upon that?

"A. I have not advanced it, I expect I will have to.

"Q. Do you know how much that will amount to?

"A. I suppose around \$700, something like that.

"Q. With whom did you agree to take care of that?

"A. Mr. A. F. Freeman.

"Q. You agreed to pay him \$700 for that?

"A. We have not determined upon the amount, because if it were successful it would be a little more and if not it would be a little less. Mr. Freeman was taken into the case at my suggestion, * * * Well,

it figures like this: we will say the first mortgage was for \$1,400 (really \$1,237.34), and we will say that I gave them \$500 in money * * * I was to take care of Mr. Freeman's account which was something we couldn't exactly arrive at until we got to the end.

"Q. Do you know what those amounts figure up at?

"A. I couldn't tell you until I settle with Mr. Freeman."

While this evidence may not be conclusive against defendant's present contention, it would appear to be significant, and, in a case where a fact is asserted by one and denied by one other, no other witnesses to the transaction being obtainable, we are impressed that its significance may be accentuated. Upon a careful perusal of the whole record we are disposed to the view that the conclusion first reached by the learned trial judge that a new trial should be ordered was correct.

The assignments of error based upon alleged improper conduct of counsel are not considered. Upon another trial no occasion for complaint on this score should be permitted to arise.

The judgment is reversed and a new trial ordered, with costs.

BIRD, C. J., and SHARPE, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

CITY OF KALAMAZOO v. TITUS.**1. STATUTES—POWERS OF LEGISLATURE—RIGHT OF LOCAL SELF-GOVERNMENT.**

By our system of State government the right of local self-government is, and always has been, a part of the system, but under the Constitution the legislative power of the State, and all of it, is reposed in the legislature, save only as reserved by referendum and initiative.

2. MUNICIPAL CORPORATIONS—CREATURES OF LEGISLATURE—DERIVED POWERS.

Municipal corporations created by the legislature have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers, acting by a delegated authority, and can exercise those powers only which are expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant.

3. SAME—CONSTITUTIONAL LAW—PUBLIC UTILITIES—LEGISLATIVE CONTROL.

Although the Constitution of 1909 provided that cities and villages might acquire, own and operate public utilities, etc., it recognized and affirmed the theory that cities owe their origin and their powers to the legislature, and that the latter has general control over them.

4. SAME—RIGHT TO FIX RATES OF PUBLIC UTILITIES—DELEGATED POWER.

If a city has power to regulate the rates of public utility companies using the streets, alleys or public places of the city in any case, it is a derived, a delegated, power, the source of which is the Constitution and the general law under which it is organized.

5. SAME—LOCAL SELF-GOVERNMENT—RIGHT TO FIX RATES—INTERFERENCE BY LEGISLATURE.

Power to regulate rates of public utility companies is not a power necessary to local self-government, denial of which, or interference with the exercise of which, by the legislature, would be interference with local self-control.

6. SAME—RIGHT TO FIX RATES—DELEGATED POWERS—INFERRED POWERS.

Although the "Home Rule Act" (Act No. 279, Pub. Acts 1909, 1 Comp. Laws 1915, § 3304 *et seq.*) delegated to cities the power to provide for the use, regulation, and control of their streets by public utility companies, the power to fix compulsory rates can not be inferred, where it was not expressly delegated.

7. GAS—RIGHTS OF COMPANY DERIVED FROM STATE.

A gas company derives its right to make and sell gas, not from the city, but from the State.

8. MUNICIPAL CORPORATIONS—GAS RATES—POWER OF CITY TO FIX UNDER HOME RULE CHARTER.

No power having been delegated to cities under the "Home Rule Act" to fix compulsory rates for public utility companies, the city of Kalamazoo had no authority, under its charter, adopted in pursuance of said act, to prescribe compulsory rates for gas, and an ordinance prescribing rates at which gas should be furnished to consumers and providing a penalty for its violation, is therefore void.¹

Certiorari to Kalamazoo; Weimer (George V.), J. Submitted January 21, 1919. (Calendar No. 28,636.) Decided December 23, 1919.

Mandamus by the city of Kalamazoo to compel Albion B. Titus, justice of the municipal court, to issue a warrant for the violation of an ordinance. From an order denying the writ, plaintiff brings certiorari. Affirmed.

Marvin J. Schaberg and *Harry C. Howard*, for appellant.

Albion B. Titus and *Alfred J. Mills*, for appellee.

The city attorney of the city of Kalamazoo applied to the justice of the municipal justice's court of that city to entertain a complaint against the Michigan Light Company, a corporation furnishing gas to the

¹On power of municipality apart from contract, to regulate the rates to be charged by public service corporations, see notes in 33 L. R. A. (N. S.) 759; 43 L. R. A. (N. S.) 994.

city and its inhabitants, and to issue a warrant upon said complaint against said Michigan Light Company. The justice refused to entertain the proceeding. Thereupon the city applied to the circuit court for Kalamazoo county to issue the writ of mandamus requiring the justice to entertain the proceeding. An order to show cause was issued, an answer made, a hearing was had upon the petition and answer, and the court refused the writ. A writ of certiorari was sued out of this court to review the action of the circuit court. The complaint which it was proposed to file with the justice is not before us. The ordinance of the city of Kalamazoo which it is claimed has been violated by the Michigan Light Company is known as ordinance No. 1, containing 33 sections, approved June 10, 1918, and is entitled:

"An ordinance to regulate the sale of gas in the city of Kalamazoo; provide for the appointment of gas inspector and prescribing the duties of such officer; providing for the inspection of gas and gas meters; prescribing rules and regulations for the quality, pressure and measurement of gas supplied to consumers, and for the enforcement thereof; prescribing the rate at which gas may be sold in the city; provide for the extension of gas mains and services, and prescribing penalties for the violation thereof."

Section 2 of this ordinance reads:

"From, including and after the 15th day of June, A. D. 1918, any person, persons, firm or corporation furnishing gas in the city of Kalamazoo by means of pipes or mains laid in the streets, alleys, or public grounds of said city shall furnish such gas of the quality, and in accordance with the regulations herein provided in this ordinance to all parties desiring to use the same along the streets, alleys and grounds where such mains or pipes are laid at a price of not to exceed eighty-five (85c) cents per one thousand cubic feet, provided that the person, firm, or corporation so furnishing said gas may charge a minimum

fee of not to exceed twenty-five (25c) cents per month, and provided further that any person, firm, or corporation so furnishing gas may add to the amounts charged for gas delivered by such person, persons, firm, or corporation and consumed by parties desiring to use the same a percentage of not to exceed ten (10) per cent., which may be collected by said person, persons, firm, or corporation so furnishing gas, in all cases where bills rendered for the gas consumed shall not have been paid by the consumers within fifteen (15) days after the expiration of the month for which the bill is rendered. No rent or charge whatever shall be charged by any person, firm, or corporation furnishing gas in the city of Kalamazoo to the consumers for any meter in addition to the prices hereinbefore provided."

The concluding paragraph of section 32 is:

"This ordinance shall not be construed in any way as a franchise, but is merely regulatory, and the city commission reserves the right to alter, amend, or repeal this ordinance at any time, and to make such further rules, orders, and regulations as may from time to time be deemed necessary to the city commission to protect the interest, safety, and welfare of the public, or the rights of property of the city of Kalamazoo."

It is provided (section 31), after enumerating various penalties incurred by specific violations of the ordinance, that—

"In case of any other violation of any of the provisions or sections of this ordinance in which a penalty is not otherwise expressly provided, the sum of one hundred (\$100.00) dollars for each and every violation thereof, and each day's violation thereof shall be considered a separate offense."

It is set out in the petition for the writ of mandamus that on the 15th day of August, 1918, the Michigan Light Company charged one Dr. Paul T. Butler, a citizen of Kalamazoo, for gas at the rate of one dollar per thousand feet, contrary to the provi-

sions of the said ordinance. It is also alleged that the Michigan Light Company has absolutely refused and neglected to in any manner comply with the ordinance, that it has denied the validity of the same, and operates its plant and uses the streets of the city without regard to the provisions of the ordinance and without obtaining any permission or authority whatsoever from the city.

The ordinance was passed, it is alleged, by virtue of the authority found in section 156 of the charter of the city of Kalamazoo, reading:

“The city commission shall have the power and authority to regulate the rates of all public utility companies using the streets, alleys or public places of the city of Kalamazoo in all cases in which the franchise rights of such utility companies have expired or at the expiration of any franchise hereafter.”

The charter was adopted by the electors of the city February 4, 1918, acting in that behalf under the provisions of Act No. 279, Public Acts of 1909, as amended (1 Comp. Laws 1915, § 3304 *et seq.* The city commission is the legislature of the city.

The Michigan Light Company is a Michigan corporation which once had a franchise from the city in which the rates to be charged for gas were agreed to, which franchise (ordinance 121) expired by limitation July 14, 1916. Since the last-mentioned date, it has occupied the streets and conducted its business without permission of the city, serving the inhabitants as theretofore, selling gas at prices fixed by itself. No material facts are in dispute.

In his answer to the order to show cause the municipal justice denied that the city has authority to adopt an ordinance “regulating the rate of gas to be sold in the city,” and asserted that he—

“refused to issue process or institute proceedings against the Michigan Light Company under the pro-

visions of said ordinance because said ordinance is invalid, and the municipal justice court has no jurisdiction because the ordinance in question is legislative in character, and under the provisions of a 'home rule charter,' so-called, the city commission of the city of Kalamazoo does not possess the power to enact a legislative ordinance to be enforced by a proceeding penal in its nature and that therefore this defendant in issuing process under said ordinance would be acting without jurisdiction."

The order of the circuit court contains the following:

"It appearing to the court that the ordinance attached to said petition and known as ordinance number 1 of the city of Kalamazoo, said ordinance being an ordinance to regulate the sale of gas in the city of Kalamazoo, etc., is invalid because said ordinance is legislative in character, and neither under the provisions of Act No. 279 of the Public Acts of 1909, as amended and now in force, and commonly known as the home rule bill, nor the Constitution or laws of the State of Michigan, did the city commission of the city of Kalamazoo possess the power to enact said ordinance, and therefore the defendant in issuing process under said ordinance would be without jurisdiction."

The argument advanced by the city, the plaintiff in certiorari (and we use the language of the brief, which, after a reference to sections 20, 21 and 28 of article 8 of the Constitution, continues), is:

"The constitutional provisions must be read together, and considered in the light of the relation which they bear to each other. The Constitution provides clearly for local self-government for each city of the State, and reserves to each city the right of reasonable control over its streets, and provides further that under such general laws as may be passed by the legislature, each city has the right to adopt a charter and pass all laws and ordinances in relation

to its municipal concern, subject to the Constitution and general laws of this State.

"There is therefore clearly no constitutional limitation upon the right of the city under a home rule charter to adopt the charter provision hereinbefore set forth.

"At this point we respectfully contend that under the constitutional provision hereinbefore mentioned, the authority of the legislature to limit the powers of a city under a charter adopted under this constitutional provision is limited as specifically set forth in said section 20, namely, to a rate of taxation and restriction of their powers of borrowing money and contracting debts.

"In other words, we respectfully contend that it is the clear intent of the Constitution to grant to cities of the State of Michigan local self-government, except to such restrictions as the legislature may by general law place upon their rate of taxation, and their power of borrowing money and contracting debt. We do not believe that it was ever the intent of the framers of the Constitution that a city is limited in its home rule charter to only such powers as it may obtain by legislative grace.

"A reasonable construction of this constitutional provision would be that a municipality has the right to adopt such local legislation as it sees fit under such procedure as may be defined by the legislature, provided such legislation does not conflict with the Constitution or general laws of the State, that the cities were really granted local self-government, that is the power to determine such policies and adopt such ordinances as the city might deem beneficial to its inhabitants, bearing in mind always that such general laws as the legislature adopted would be supreme where there is any conflict between a local ordinance and a State statute."

It is further contended that, if it is determined that the power claimed and expressed in the charter is not conferred in the Constitution itself, it was delegated by the legislature in the act of 1909 (1 Comp. Laws 1915, § 3307) in the words—

"Each city may in its charter provide: * * *

"(g) For the use, regulation and control of the surface of its streets, and of the space above and beneath them."

And counsel say:

"A careful examination of this language renders it difficult to imagine how the entire power over the use, regulation, and control of the streets could be granted in broader or more inclusive terms. This section makes it possible for any municipality to provide in its charter for the use, regulation, and control of its streets to the broadest possible extent, and to contend that this language would not include the right to regulate a rate conditional upon the use of the streets by a public utility would seem to be a travesty in the light of this language. This power is not only broad, but indicates that the legislature intended that it should be broad and inclusive of everything. The legislature does not enumerate, nor attempt to define or limit the extent of the power of the city over its streets. It may provide first for the use of its streets and the space above and beneath them. It may provide for the regulation of its streets, and finally for the control of its streets. It is not necessary to put any strained construction upon these words for the legislature never intended that this construction should be strained nor limited. The dictionary can be searched in vain for any broader or more inclusive language, and the vocabulary can conceive of no word which could have been used which would have granted to a municipality broader power than this. It was meant to grant to a city home rule so far as its streets were concerned, and the vesting of the use, regulation, and control is left to the electors in their charter."

Various reasons are asserted by counsel for defendant in certiorari why the charter of Kalamazoo ought to be held to be invalid. The question sought to be settled, and the only one considered, is whether the city had power to enact and enforce an ordinance fixing the prices for which the Michigan Light Company shall sell gas.

STONE, J. (*after stating the facts*). In *City of Kalamazoo v. Kalamazoo Circuit Judge*, 200 Mich. 146, it appeared that the city, then existing under a special charter, after the expiration of a franchise of the Michigan Light Company, passed an ordinance, taking effect August 1, 1916, fixing the price to be charged for gas at 75 cents per thousand feet and imposing penalties for disobedience of its provisions. The city sued to recover a penalty because the company persisted in charging more than the prescribed price. Upon an appeal to the circuit court, the city asked for an order permitting it to examine the books of the company, and the company moved to dismiss the case on the ground that the ordinance was invalid. It was dismissed. An order to show cause why the order dismissing the suit should not be set aside was made by this court, and upon the petition for the order and the return we decided, (1) that the fixing of such prices or rates is a governmental, legislative, function, which (2) may be delegated by the legislature to a municipality, but (3) only in express terms or by necessary implication, and that it did not appear that the power had been delegated to the city, expressly or by necessary implication, (4) that the asserted power was not conferred upon the municipality by section 28, article 8, of the Constitution. *City of Detroit v. Railway Co.*, 172 Mich. 136, was cited. Thereafter, as has been related, the city of Kalamazoo adopted its present charter and enacted the ordinance in question.

The charter provision, the ordinance, the argument made for the city, indeed, the suit itself, reflect a popular interest in, and, we conceive, a popular misunderstanding about the subject of home rule, so-called, in cities. There is apparent a widely spread notion that lately, in some way, cities have become possessed of greatly enlarged powers, the right to exercise which may come from mere assertion of their existence and

the purpose to exercise them. Whether these powers are really inherent in the community, but their exercise formerly was restrained, or are derived from a new grant of power by the State, or may be properly ascribed to both inherent right and to a new grant, are questions which do not seem to bother very much the advocates of the doctrine that they in any event exist. On the other hand, there is expression of grave doubt whether, in the view of the law, there has been any enlargement or extension of the subjects of municipal legislation and control or of the powers of cities except as those subjects and powers are specifically enumerated and designated in the Constitution itself and in the home rule act.

Political experiment has not yet produced, in this State, the autonomous city,—a little State within the State. We have a system of State government and the right of local self-government is, and always has been, a part of the system. We have, as we have always had, a State Constitution, the fundamental law. By it, now, as formerly, the legislative power of the State, and all of it, is reposed for exercise in a legislature; save only as reserved by referendum and initiative proceedings, which are not here involved.

“One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. * * *

“It has already been seen that the legislature cannot delegate its power to make laws; but fundamental as this maxim is, it is so qualified by the customs of our race, and by other maxims which regard local government, that the right of the legislature, in the entire absence of authorization or prohibition, to create towns and other inferior municipal organizations, and to confer upon them the powers of local govern-

ment, and especially of local taxation and police regulation usual with such corporations, would always pass unchallenged. The legislature in these cases is not regarded as delegating its authority, because the regulation of such local affairs as are commonly left to local boards and officers is not understood to belong properly to the State; and when it interferes, as sometimes it must, to restrain and control the local action, there should be reasons of State policy or dangers of local abuse to warrant the interposition.

"The people of the municipalities, however, do not define for themselves their own rights, privileges, and powers, nor is there any common law which draws a definite line of distinction between the powers which may be exercised by the State, and those which must be left to the local governments. The municipalities must look to the State for such charters of government as the legislature shall see fit to provide; and they cannot prescribe for themselves the details, though they have a right to expect that those charters will be granted with a recognition of the general principles with which we are familiar. The charter, or the general law under which they exercise their powers, is their constitution, in which they must be able to show authority for the acts they assume to perform. They have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers, acting by a delegated authority; so that while the State legislature may exercise such powers of government coming within a proper designation of legislative power as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant." Cooley's Constitutional Limitations (7th Ed.), pp. 163, 264 *et seq.*

The quotations are sufficient to present, in a general way, the theory up to this time judicially admitted of the relation of cities in the State to the State itself. It was said by Chief Justice CAMPBELL in *People v. Hurlbut*, 24 Mich. 44, 89:

"Our Constitution cannot be understood or carried out at all, except on the theory of local self-government; and the intention to preserve it is quite apparent."

In the Constitution of 1850, the subject was not left wholly to the application of a general theory of State government, but was referred to in provisions in harmony with that general theory. In article 4, section 38, it was provided that—

"The legislature may confer upon organized townships, incorporated cities and villages, and upon the board of supervisors of the several counties, such power of a local, legislative and administrative character as they may deem proper."

In article 15, section 13, the legislature is enjoined to provide for the incorporation and organization of cities and to restrict the powers of taxation, borrowing money, contracting debts and loaning their credit.

A general law for the incorporation of cities is not, as we know, a new, but is a very old, thing. We have had such a law for many years. But the legislature was much occupied in granting special charters to cities, and in making successive amendments to such charters. The supposed evils attending upon the enactment of special charters brought about a constitutional amendment. As invention and use created necessity for certain local conveniences, usually furnished and managed by private action, communities sought enlargement of their powers so that they might own and control the means by which such conveniences were furnished. They sought to have these enlarged powers defined and put, in a measure, beyond legislative control. The history of the changes is not important. In the Constitution of 1909 appears the result of them. A brief reference to them will be made. The heading of article 8 of the Constitution is "Local Government." It is provided (section 20) that

the legislature shall provide by a general law for the incorporation of cities and in the general law *shall* limit their rates of taxation for municipal purposes and restrict their powers of borrowing money and contracting debts. Section 21 reads as follows:

"SEC. 21. Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter and to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of this State."

In section 22 permission is given to any city or village to acquire, own, establish and maintain, either within or without its corporate limits, parks, boulevards, cemeteries, hospitals, almshouses and all works which involve the public health and safety. In section 23 it is provided that, subject to the provisions of the Constitution, any city or village may acquire, own and operate, either within or without its corporate limits, public utilities for supplying water, light, heat, power and transportation to the municipality and the inhabitants thereof and may sell and deliver water, heat, power and light without its corporate limits, and may operate transportation lines without the municipality within such limits as may be prescribed by law. The method of financing the acquisition and operation of a public utility is dealt with in section 24, and in section 25 limitations are laid upon the exercise of the powers conferred. Section 28, because its provisions are relied upon by the plaintiff in certiorari, is set out:

"SEC. 28. No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the

consent of the duly constituted authorities of such city, village, or township; nor to transact a local business therein without first obtaining a franchise therefor from such city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships."

With regard to the subject we are considering, the impressive thing about these constitutional provisions is that they recognize and affirm the theory that cities owe their origin and their powers to the legislature. And while cities may refer power to do some things, as, for example, power to acquire certain public works, directly to some of these constitutional provisions, it must be admitted that all of these provisions should be considered with reference to the fact that legislative power is vested in the legislature and that the Constitution recognizes, as former Constitutions have recognized, the general control of the legislature over cities. That the legislative power ought to be exercised in such manner as to preserve the right of local self-government is a doctrine which in application in no way modifies or qualifies the idea of the general legislative power of creation and control. If, therefore, the city of Kalamazoo, in its city commission, has power—

"to regulate the rates of all public utility companies using the streets, alleys or public places of the city"

in any case, it is a derived, a delegated, power, the source of which is the Constitution and the general law under which it is organized.

We might go further and point out, what is true, that power to regulate rates of public utility companies is not a power necessary to local self-government, denial of which, or interference with the exercise of which by the legislature, would be interference with local self-control. Counsel for the city, however, rely upon a derived, a delegated, power.

Has the legislature in the general law delegated to cities the power to fix rates—compulsory rates—for public utilities, or any of them? It is not contended that it has done so in terms. The contention made in respect to the power to fix the price of gas is, as has been pointed out, based upon the rather plenary grant of power to provide for the use, regulation and control of streets. But the fixing of a compulsory price for gas cannot be reasonably referred to use, regulation or control of streets. The gas company derives its right to make and sell gas, not from the city, but from the State. Beyond this, we held in *Traverse City v. Railroad Commission*, 202 Mich. 575, 581, and in *City of Kalamazoo v. Kalamazoo Circuit Judge*, *supra*, with a reference to decided cases, that such a power, if delegated, must be delegated in express terms. As affecting the question before us, the city does not appear to have derived any new powers of legislation with its new charter. As in *City of Kalamazoo v. Kalamazoo Circuit Judge*, its contentions are overruled.

The matter and language of this opinion are largely those of the late Justice OSTRANDER, which are now formulated into this opinion of the court.

Judgment is affirmed, with costs to defendant in certiorari.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

KENTUCKY WAGON MANFG. CO. v. KALAMAZOO CIRCUIT JUDGE.

1. **MANDAMUS—RETURN TO BE TAKEN AS TRUE UNLESS TRAVERSED.**
On mandamus against a circuit judge, the return of the judge unless traversed must be taken as true.

2. **PROCESS—DEFAULT—REGULARITY—CIRCUIT COURT RULE—SETTING ASIDE DEFAULT.**

The service of a copy of the rule to plead, instead of a notice thereof, on defendant, at the time of service of the declaration, was not such a defect in the proceedings as to affect the regularity of the entry of default, and thus toll Circuit Court Rule No. 32, § 4, providing that where personal service shall have been had, and proceedings taken after default on the strength thereof, the default shall not be set aside unless the application shall be made within six months after such default is regularly filed.

Mandamus by the Kentucky Wagon Manufacturing Company to compel George V. Weimer, circuit judge of Kalamazoo county, to vacate an order setting aside a default judgment. Submitted October 21, 1919. (Calendar No. 28,800.) Writ granted December 23, 1919. Rehearing denied January 28, 1920.

Robert L. Campbell, for plaintiff.

Harry C. Howard, for defendant.

The Kentucky Wagon Manufacturing Company commenced suit by declaration against the Barley Motor Car Company in the Kalamazoo circuit court on the 22d day of December, 1917. Rule to plead was filed, and notice of such rule was indorsed on the original declaration. On the same day the return of the deputy sheriff was filed. He returned that on that day he—
“served the declaration of which the within is a copy, on the Barley Motor Car Company, the defendant

named in said declaration, by delivering to E. H. Beacham, assistant manager of Barley Motor Company, said defendant in said county of Kalamazoo, a true copy thereof, together with rule to plead, attached thereto as hereto attached, and also a copy of the attached affidavit and statement of account."

On January 19, 1918, defendant's default was entered and on July 13, 1918, judgment was entered for \$5,925.40 and costs, which were taxed July 30th. On August 13th, and more than six months after the default was entered, defendant filed a motion to set aside the default with accompanying affidavits. These affidavits set up a meritorious defense and allege that the service was not made on Mr. Beacham or any one connected with the company, and deny the agency and authority of Mr. Beacham. An issue of fact was framed and testimony was taken in open court upon the hearing of this motion, as provided in section 12580, 3 Comp. Laws 1915. The circuit judge found on disputed testimony that the service was made upon Mr. Beacham, that he was the agent and assistant manager of the defendant, but concluded that the service was insufficient because the return of the officer showed that a copy of the rule to plead instead of notice thereof was served, and set aside the default. This court issued an order to show cause why mandamus should not issue to compel the vacation of this order. A return has been made, which, at defendant's request, contains the testimony taken upon the hearing of the motion.

FELLOWS, J. (*after stating the facts*). The findings of fact made by the circuit judge are supported by testimony taken upon the hearing of the motion. His return to the order to show cause has not been traversed by any pleading filed in this court. We are pointed to no practice which would permit us, upon this state of the pleadings, to try out again the facts

found and returned by the circuit judge to be the facts in the case. Under repeated decisions of this court the return of the circuit judge unless traversed must be taken as true.

Circuit Court Rule No. 32, § 4, so far as important here, provides:

"In all cases where personal service shall have been made upon a defendant, and proceedings taken after default on the strength thereof, his default shall not be set aside unless the application shall be made within six months after such default is regularly filed."

This court has not infrequently been required to enforce the provisions of this rule: *Petley v. Wayne Circuit Judge*, 124 Mich. 14; *Burgard v. Burgard*, 175 Mich. 565; *St. Louis Hoop & Stave Co. v. Wayne Circuit Judge*, 155 Mich. 311; *Carpenter v. Judge of Superior Court*, 126 Mich. 8; *Biensteadt v. Clinton Circuit Judge*, 142 Mich. 633; *Caille Bros. Co. v. Saginaw Circuit Judge*, 155 Mich. 480; *Cook v. Wayne Circuit Judge*, 197 Mich. 19. This court has also held that the limitation of the rule does not apply where the default is not regularly entered. *Turner v. Ottawa Circuit Judge*, 123 Mich. 617; or the proceedings taken on the strength thereof were not valid proceedings. *W. H. Warner Coal Co. v. Nelson*, 204 Mich. 317.

We therefore come to the single controlling question in the case: Was the service of a copy of the rule to plead, instead of a notice thereof, such a defect in those proceedings as we may say that the default was not regularly entered and thus toll the rule? We are persuaded that this question must be answered in the negative. A copy of the rule gave the defendant the same information that a notice of it would. The purpose of the notice is that knowledge, information of the filing of the rule, shall be given the defendant in order that he may know that he is required to plead within 15 days. A copy of the rule certainly is as

efficient for this purpose as notice of it would be. In the recent case of *In re Joseph*, 206 Mich. 659, we held that the attachment of the notice of the rule to plead to the declaration instead of writing it on the back of the document did not vitiate the service and proceedings. Upon principle we think that case should control here. There the defendant was served with notice of the rule to plead but it was not written on the back of the declaration; here the defendant was given notice of the rule to plead by receiving a copy of the rule itself instead of a notice thereof. In both cases there was a substantial compliance with the statute. This was not such a defect in the service as would justify us in holding that the default was not regularly entered.

The writ will issue.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

GROCERS, INC., v. ALLEGAN CIRCUIT JUDGE.

PROCESS—SERVICE—ATTACHMENT OF NOTICE OF RULE TO PLEAD—
JURISDICTION.

Where suit was started by declaration, attaching thereto a rule to plead and notice of rule to plead, there was a substantial compliance with the judicature act (3 Comp. Laws 1915, § 12407), and the trial judge was in error in holding that service of the rule to plead and notice thereunder was insufficient to confer jurisdiction.

Mandamus by the Grocers, Incorporated, to compel Orien S. Cross, circuit judge of Allegan county, to vacate an order dismissing a cause of action. Submitted October 7, 1919. (Calendar No. 28,882.) Writ granted December 22, 1919.

Wilkes & Stone (Henry F. Jacobs, of counsel), for plaintiff.

Charles Thew, for defendant.

BROOKE, J. Plaintiff started suit by declaration, attaching thereto a rule to plead and notice of rule to plead which was proper practice under the applicable law prior to the passage of the judicature act, 3 Comp. Laws 1915, § 12407, which provides:

"All actions at law in any court of record, except mandamus, quo warranto, and certiorari, may be commenced either,

"1. By original writ or

"2. By filing in the office of one of the clerks of the court, a declaration upon which is indorsed a notice in substantially the following form:

"To.....Defendant:

"You are hereby notified that a suit has been commenced against you as defendant by....., as plaintiff, and that the within is a true copy of plaintiff's declaration in said cause, and that if you desire to defend the same, you are required to plead thereto within fifteen days after service upon you of a copy of said declaration.

"Dated.....

".....
"Attorney for Plaintiff."

After service, on motion of defendant an order was entered by the circuit court dismissing said cause for want of jurisdiction of the parties, it being held that the service of the rule to plead and notice thereunder was not a substantial compliance with the provisions above quoted from the judicature act. In so deter-

mining we must hold the learned circuit judge was in error. The thing to be accomplished was the notification of the defendant of the pendency of the suit and the time within which he would be required to plead. That purpose was as well accomplished by service under the old practice as under the new. The judicature act in terms requires only a *substantial compliance*. Pending the hearing of the motion to dismiss the plaintiff filed a new declaration (not entitled in the cause), containing the notice required by the judicature act. A second motion to dismiss the new declaration was likewise granted by the court.

Inasmuch as the court was in error in dismissing the action because of the alleged improper service it is apparent that there was no necessity for filing the second declaration.

The writ will issue requiring the circuit judge to set aside both orders and reinstate the case. Upon the question here involved, see *In re Joseph*, 206 Mich. 659, and *Kentucky Wagon Manfg. Co. v. Kalamazoo Circuit Judge*, ante, 267. With costs to plaintiff.

BIRD, C. J., and SHARPE, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

GOODMAN v. DIAMOND.

LANDLORD AND TENANT—LEASE—CONSTRUCTION.

The decree of the court below determining that defendants, lessees of space in plaintiff's store building, should have the use of a front portion of one window back to the first panel for display purposes, where it appears that such space had been customarily used by them until friction arose, and their lease gave them the right to "window space for a proper display of millinery," but without specifying the exact space, and also determining the time of payment of money arising from daily sales by plaintiff to defendants, and the time of payment by defendants to plaintiff of the rent, *held*, justified by the record.

Appeal from Genesee; Black (Edward D.), J. Submitted October 17, 1919. (Docket No. 84.) Decided December 22, 1919.

Bill by Philip E. Goodman, by his attorney, against Harry Diamond and another to enjoin the violation of a lease, and to declare the same forfeited. Defendants filed a cross-bill asking affirmative relief. From the decree rendered, plaintiff appeals. Affirmed.

Harold Goodman, for plaintiff.

Thomas F. Stockton, for defendants.

BROOKE, J. The plaintiff in this case operates a store in which he sells ready-to-wear ladies' goods in the city of Flint. On March 19, 1917, he entered into an agreement with defendant Harry Diamond by the terms of which he leased to Diamond certain space in his store for a consideration of 10% of the gross sales made by Diamond, the minimum to be \$125 per month. The agreement covered a period of three years

and one month and would therefore expire May 1, 1920. One clause of the contract provided:

"The party of the first part hereby also agrees to furnish light, heat, water, local telephone and janitor services; also window space for a proper display of millinery, also all necessary wrapping paper and twine that may be required by the party of the second part in his said millinery business."

So long as the plaintiff himself was in charge of his own business the parties seem to have been able to get along without friction. In June, 1918, however, plaintiff entered the military service of the United States and later was sent to Russia. In his absence he turned over the management of his store to other members of his family. He gave a power of attorney to his father, Solomon Goodman, but two or more of his brothers were active in the store. Very soon after his departure difficulties arose between his representative and the Diamonds, husband and wife, with reference to the window space to be used in the display of the Diamond merchandise. These disputes were very acrimonious, resulting upon at least one occasion in actual physical violence. The situation becoming intolerable, plaintiff, through his father, as attorney in fact, filed his bill of complaint praying for an injunction temporary and permanent against the Diamonds, husband and wife, restraining them from the use of profane and obscene language in the store either towards each other or toward the agents or employees of either the plaintiff or defendants, and further that the said Diamonds, husband and wife, be restrained from using physical violence toward any of the agents or employees of plaintiff or any of their customers. A further prayer for relief is that the lease agreement subsisting between the parties be canceled and held for naught. Upon the filing of his bill a preliminary injunction issued in accordance with its prayer restrain-

ing defendants from using physical violence or boisterous, profane or obscene language in the store. Defendants answered, admitting some of the averments of the bill and denying others, and, by way of cross-bill, averring that plaintiff had wrongfully interfered with the use by defendants of the proper space in one of the front windows of plaintiff's store for the display of their merchandise. An injunction was sought on the cross-bill restraining plaintiff from preventing defendants' use of one of the windows to the depth of the first panel for display. Upon the filing of the cross-bill an injunction was issued against plaintiff in accordance with the prayer thereof. The case went to trial upon the pleadings, testimony being taken in open court. We find a very considerable record made up principally of varying accounts of several quarrels and physical clashes between defendants and one or other of plaintiff's agents. The court entered a decree making both preliminary injunctions permanent, determined that the defendants should have the use of a front portion of one window back to the first panel and regulated in his decree the time of payment by plaintiff to defendants of the money received for the sale of goods and the time of payment by defendants to plaintiff of the rent reserved in the lease quoted. Plaintiff has appealed. His principal contention being that the relations between the parties by reason of the unwarranted acts of the defendants have been such as to destroy any possibility of friendly co-operation and to imperil or at least to injure his business.

From a careful perusal of the record we gather that while defendants were not always afforded a position for display in the front of one or the other of the windows, yet that such display was customarily so placed. We are, therefore, of opinion that the court made a proper determination of that question in the interest of harmony, the quoted part of the agreement

being silent as to exactly what portion of the window space might be used by defendants. Construed in its entirety we think that the lease agreement between the parties justifies the decree of the court below as to the time of payment of the money arising from daily sales, by plaintiff to defendants, and the time of the payment by defendants to plaintiff of the amount of rent reserved. This lease or privilege has now a little more than four months to run. It is asserted in briefs of counsel that since the decree of the court below the parties have been able to avoid overt encounters and that the business has been prosperous. Enlightened self-interest should urge both parties to this litigation to assume an attitude of forbearance toward each other during the short time this contract still lives.

The decree of the court below is affirmed, but without costs.

BIRD, C. J., and SHARPE, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

UMPHREY v. AUYER.

USURY—BONUS INCLUDED IN NOTE—PRINCIPAL AND AGENT.

In proceedings to foreclose a real estate mortgage, where the notes given therewith included a ten per cent. bonus in addition to the amount actually loaned, and also provided for seven per cent. interest, the highest legal rate, the same were usurious under 2 Comp. Laws 1915, § 5998.

and the assignee thereof with notice was not entitled to receive any interest thereon, and it is unimportant whether the mortgagee or her husband, who acted as her agent in negotiating the loan, received the ten per cent. bonus.

Appeal from Osceola; Cutler (Hal. L.), J. Submitted October 15, 1919. (Docket No. 48.) Decided December 22, 1919.

Bill by William F. Humphrey against Fred Auyer for the foreclosure of a mortgage. From the decree rendered, plaintiff appeals. Affirmed.

Charles A. Withey, for plaintiff.

W. E. Brown, for defendant.

Plaintiff, as assignee of Mrs. Margaret I. Postal, brought suit to foreclose a real estate mortgage held as collateral to a promissory note. At the time the loan was made the defendant executed two promissory notes to plaintiff's assignor, one for \$1,300 and the other for \$59.42. It is claimed by defendant and admitted by plaintiff that included in these two notes is a 10 per cent. bonus or commission to James R. Postal, husband of plaintiff's assignor, through whom the loan was negotiated. Defendant in his answer set up facts which he claimed constituted usury. The case was heard in open court, all the parties in interest being examined orally and a decree was entered providing for the foreclosure of said mortgage but holding that the transaction was a usurious one and limiting the amount of the decree to the principal sum unpaid. From this decree plaintiff appeals.

BROOKE, J. (*after stating the facts*). There would appear to be no dispute between the parties upon the facts in this case except that the plaintiff claims that

the 10 per cent. was exacted by James R. Postal as a commission to himself for negotiating the loan from his wife to the defendant, while defendant claims that the 10 per cent. was exacted by Postal as a bonus *to his wife* for making the loan. This conflict in the claims of the parties under our view of the case is unimportant. The statute, 2 Comp. Laws 1915, § 5998, provides:

"No bond, bill, note, contract or assurance, made or given for or upon a consideration or contract, whereby or whereon a greater rate of interest has been, directly or indirectly, reserved, taken, or received, than is allowed by law, shall be thereby rendered void; but in any action brought by any person on such usurious contract or assurance, except as is provided in the following section, if it shall appear that a greater rate of interest has been, directly or indirectly, reserved, taken or received, than is allowed by law, the defendant shall not be compelled to pay any interest thereon."

The mortgage and notes provided for 7 per cent. interest (the highest legal rate), and the notes included the 10 per cent. additional. There is no claim made that more than \$1,231.29 was paid out by Mrs. Postal and it is admitted that she received notes aggregating \$1,359.42 payable to herself. The words of the statute are plain:

"If it shall appear that a greater rate of interest has been *reserved, taken or received*, than is allowed by law, the defendant shall not be compelled to pay any interest thereon."

Whether Mrs. Postal or her husband received the avails of the 10 per cent. commission or bonus would seem unimportant. It certainly was reserved to her in the written instruments constituting the evidence of the transaction. In the course of his evidence James R. Postal testified that in negotiating the deal with defendant he was acting as agent for his wife.

It should perhaps be noted that the plaintiff does not claim to be a holder for value without notice but admits that he takes the security with such infirmities, if any, as would have attached thereto in the hands of the original holder.

The decree is affirmed.

BIRD, C. J., and SHARPE, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

GOODMAN v. DETROIT UNITED RAILWAY.

STREET RAILWAYS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—DIRECTED VERDICT.

In an action for the death of plaintiff's decedent, who was struck and injured by defendant's east-bound street car after alighting from and passing around the front of a west-bound car, where it appears that the physical facts were such that it would have been impossible for the motorman, no matter how malicious, careless, or incompetent he was, to have run down decedent if he had exercised due care in stepping upon the track, the trial judge properly directed a verdict for defendant.

Error to Wayne; Collingwood (Charles B.), J., presiding. Submitted October 10, 1919. (Docket No. 28.) Decided December 22, 1919.

Case by David Goodman, administrator of the estate of Aaron Ostrow, deceased, against the Detroit United Railway for the alleged negligent killing of

On the question of contributory negligence of street car passenger who, upon alighting, passes around car and is struck by car on another track and is injured, see notes in 4 L. R. A. (N. S.) 729, and 21 L. R. A. (N. S.) 887.

plaintiff's decedent. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Harry Cohen and *Washington I. Robinson*, for appellant.

Corliss, Leete & Moody (A. B. Hall, of counsel), for appellee.

BROOKE, J. Plaintiff as administrator brought suit against defendant to recover damages growing out of the alleged negligent killing of plaintiff's decedent by defendant. The accident occurred between two and three o'clock in the afternoon near the intersection of Michigan avenue and Fifth street in the city of Detroit. It is undisputed that plaintiff's decedent was struck by an east-bound car at a point a few feet east of the east curb line of Fifth street. It appears that the left-hand front portion of the car came in contact with plaintiff's decedent, knocked him down, and that the rear trucks passed over his legs, so mutilating them that amputation of both was necessary.

Plaintiff's first witness, one Hickens, testified:

"I was standing on the *southeast corner* of Fifth and Michigan. I just saw him as the car hit him. It was about half-past two or three o'clock, between that half hour. He seemed to be coming right toward me. * * * He was east of the sidewalk possibly six or eight feet, towards the city, the walk that runs north and south on Fifth street. He was struck on the north side of the east-bound track the car was on. I just happened to turn around just as the car hit him. I seen him and the car both about the same time. * * * The car went possibly 18 to 20 feet after it ran over him. The rear of the car was about 20 feet from him."

On cross-examination:

"The front of the car was running into him, the vestibule. It was the north side of the vestibule that struck him. I couldn't tell whether it was the fender,

or what, that hit him. I couldn't see it only that long (snapping fingers). * * * I saw them both at the same time, just happened to turn around at that moment. He was not scissored in between these cars, the west-bound car had passed and gone. I am sure of that."

Plaintiff's next witness, McDonald, was located on the *northwest* corner of Fifth and Michigan. This witness testified that he saw plaintiff's decedent get off the front end of a west-bound car which stopped on the east side of Fifth street. He later testified:

"The car stopped on the corner to let him off. The front end of the car was about in the middle of Fifth street. The fender came at the time he got off the car, I should judge, about three or four feet in the middle of the street. * * * I don't know where he went to after he got off; I didn't notice which way he went. I saw the car hit him. I saw him get down from the car he had been riding upon. Before he was hit when he got down, he was going across the street. * * * I saw him just before he was struck. The east-bound car running on the south side of the street, struck him. * * * On the side of the track going toward the river he was struck on, the south track, in pretty near the middle of the track I should judge. I just saw him get off the car. Didn't pay much attention. * * * I saw the car that run over him before it struck him. It had been standing to avoid the other business, you know, the other trucks. It had been standing on the west side. I don't know how long it had been standing there. When he got off from the car, that is, from the west-bound car, the east-bound car was then on the east (west) side of the street. * * * After the car ran over him it ran about 50 feet, 60 feet, somewhere around there. * * * When the east-bound car ran over him, the west-bound car was right there at the restaurant, the restaurant is located on the east side of the street, Fifth, right on the corner on the east side. The car, the one he got off, had stopped. After he got off the car went away. After he got off the car he passed around in front of it and over toward the other car; I saw that car he

got off move on toward the west; it might have went 50 or 60 feet before he was struck. It stopped again, I would say 50 or 60 feet, that would be across the street. * * * I don't know which of the cars started up first. Both cars stopped at the same time, one on the east side and one on the west side. I did not notice the cars as they started up, I didn't pay much attention to them after that."

Plaintiff's third witness to the accident, one Crane, at the time of the accident was on the north side of Michigan avenue, about 100 feet west of Fifth street. He testified:

"I couldn't see whether Mr. Ostrow got off the car there. He was standing close to the front door of the street car going west on Michigan avenue. The car stopped at the time that I say I saw him near the door on the east side of Fifth street, on Michigan avenue. As near as I could see from where I was sitting, the car stopped maybe ten or twelve feet or maybe fifteen from the curb line, that is, the curb line of Fifth street. I mean the vestibule. I did not see him get off the car, that I remember. When I saw him, I noticed a small package, just a small package; I think he had it in his hand, kind of up this way (indicating). I was paying no attention much. I saw him start to walk away from the car. He was going south then on Michigan avenue in *front of the car*. I saw him then pass in front of the car. I did not notice him after he passed the front of the west-bound car until I went to help pick him up.

"Q. Now, then, when he passed the front end of the west-bound car, whether or not you saw that car after that, the west-bound car?

"A. It was going on its route, going west.

"Q. It started then after he went over?

"A. Yes, sir. I didn't notice the east-bound car. The east-bound car would be diagonal across south on Michigan avenue when he was standing at the door of the west-bound car, within four or five feet from the curb-crossing line. Nothing in particular called my special attention to the east-bound car, but I noticed it. I saw the east-bound car start up. I didn't notice exactly where Mr. Ostrow was at the time when

it started up. I did not see the east-bound car strike him; I couldn't on account of the other car, from where I was sitting, I couldn't see him.

"Q. Where did you last see him, Mr. Ostrow, before the east-bound car struck him?

"A. Oh, around the other—just around—oh, around the side of the car—the west-bound car.

"Q. That is, had he passed the west-bound car?

"A. Yes, sir, he was.

"Q. Then he was over in the devil's strip then?

"A. The south track.

"Q. When you last saw him, he was over in the south track?

"A. I didn't take notice whether he was right in the track or in that vacant stretch there. I mean the strip between the two tracks. The west-bound car was between me and Mr. Ostrow, and that obstructed my view. I saw the east-bound car roll him after it hit him; I didn't see it strike him. I didn't pay any attention whether the west-bound car passed me when I saw him rolling. I started running right to Mr. Ostrow where he got hit. He fell on the north side of the east-bound track, and the wheels ran over him right above the shoe tops of his feet. Then it rolled him. I noticed that it rolled him ten or twelve feet. I noticed the east-bound car stop, but I didn't measure the distance; approximately 18 or 20 feet or maybe 30, for all I know, from where I was."

On cross-examination:

"There was nothing that I know between the east-bound car and Mr. Ostrow. It was a bright afternoon between two and three o'clock. The west-bound car then obstructed my view. The west-bound car couldn't start until he got out of its way. He would be over the north car tracks on Michigan avenue. I do not know what the overhang is of those cars. I do not know there is two feet overhang. In order for that car to proceed, he had to be beyond that overhang, so that would carry him into the devil's strip at least the width of that overhang. The west-bound car started first. The east-bound car didn't stand hardly a second or two still, when the west-bound car commenced moving. I suppose whatever time it stood

it stood there while this car was moving. The west-bound car couldn't move until Mr. Ostrow got in the devil's strip or else it would have run over him. So he was in the devil's strip and the east-bound car was still standing. The west-bound car proceeded and I lost sight of him. The front and rear trucks went over him. I didn't see which part of the car hit him."

On redirect-examination:

"Q. The east-bound car was standing still when he passed the west-bound car, Mr. Crane?

"A. Yes, sir.

"Q. And he had to get out of the way of the west-bound car?

"A. Yes, sir."

And on recross-examination:

"This man was not scissored; if he was scissored, he wouldn't have rolled along the street. The west-bound car had gone on."

The foregoing constitutes all of plaintiff's testimony bearing upon the conduct of plaintiff's decedent up to the moment of the accident. The testimony of the witness Hickens has no bearing upon the question involved as he did not see plaintiff's decedent until the very moment he was struck by the car. The evidence of the witness McDonald is very confusing. He first places the west-bound car from which plaintiff's decedent alighted on the east side of Fifth street, then places the front end of said car in the middle of Fifth street, and a moment later he places the fender about three or four feet in the middle of the street. He testified that the east-bound car had been standing on the west side of Fifth street. Again, he testified that:

"When the east-bound car ran over plaintiff's decedent, the west-bound car was right there at the restaurant on the east side of Fifth street."

Later his testimony is that after plaintiff's dece-

dent walked around in front of the car the west-bound car started forward, going 50 or 60 feet, and stopped. It is somewhat difficult from a perusal of this witness' testimony to get an intelligent understanding of the position of the two cars at the time that plaintiff's decedent alighted from the west-bound car, walked around in front of it and attempted to cross the street. From the evidence of the witness Crane, however, it would seem clear, that at the time the plaintiff's decedent stepped off the front end of the west-bound car, passed in front of it and attempted to cross the street, the east-bound car had stopped on the west side of Fifth street, upwards of 50 feet away; that immediately thereafter, the west-bound car started up. To have done so without colliding with plaintiff's decedent it is plain he must have been at least as far south as the middle of the strip between the two tracks. This strip is about 5 feet wide. One-half of that distance, $2\frac{1}{2}$ feet, plus the width of the south track 4 feet $8\frac{1}{2}$ inches, plus $1\frac{1}{2}$ feet, the overhang of the east-bound car, constitutes a total distance of 8 feet and 8 inches which plaintiff's decedent had to travel to a place of safety. Assuming as contended by plaintiff's counsel that after the passage of the west-bound car plaintiff could not step back on the west-bound track by reason of the oncoming vehicular traffic, there yet remains no explanation in the testimony offered on behalf of plaintiff why decedent did not take three or four steps to the south which would have placed him beyond reach of the east-bound car. Considering this situation upon a motion for a directed verdict the learned circuit judge said:

"Now, gentlemen, if I were to charge you to find a verdict in this case, I would have to charge you that the motorman started that car fifty feet away and wilfully and maliciously ran this man down when he himself with three or four steps could have placed himself in a position of safety. * * *

"Now, gentlemen, I am not going to leave you to guess on this matter, because you cannot guess, and I am going to take the position that the physical facts testified to by the witnesses for the plaintiff are such that it would have been impossible for the motorman, no matter how malicious he was or how careless he was or how incompetent he was, to have run this man down if the man had exercised due care in stepping on the track"

—and directed a verdict for the defendant. As all error is assigned, or, in effect, based upon the alleged erroneous conclusion of the trial judge in directing a verdict, it is, we think, sufficient to say that, assuming the truth of the evidence introduced on behalf of the plaintiff and giving to such evidence its greatest probative force, the course taken by the trial judge was proper.

The judgment is affirmed.

BIRD, C. J., and SHARPE, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

JUDSON v. PRATT.

1. LIMITATION OF ACTIONS—INDORSEMENTS ON NOTES—ADMISSIBILITY.

3 Comp. Laws 1915, § 12335, does not make indorsements of payments on notes incompetent as evidence, but declares them to be insufficient in themselves to take the case out of the operation of the statute of limitations.

2. SAME—APPEAL AND ERROR—ORDER OF PROOF.

In an action on certain promissory notes claimed by defendant to be barred by the statute of limitations, defendant's objection to the introduction of the notes with

indorsements of payments thereon will not be considered by the appellate court, where, after the objection, other evidence was introduced rendering them admissible; the objection going merely to the order of proof.

3. SAME—INDORSEMENTS ON NOTES—EVIDENCE—ADMISSIBILITY.

In such action, certain exhibits, properly identified, tending to show that defendant had sold certain produce to the payee and received payment therefor partly by indorsements on the notes, and partly by check, which was dated the same day as the indorsements, *held*, admissible.

4. APPEAL AND ERROR—WEIGHT OF EVIDENCE FOR JURY.

The weight and sufficiency of the evidence, *held*, peculiarly questions of fact for the jury.

Error to Genesee; Black (Edward D.), J. Submitted October 23, 1919. (Docket No. 34.) Decided December 22, 1919.

Assumpsit by Edna M. Judson, administratrix of the estate of Fred Judson, deceased, against William Pratt upon certain promissory notes. Judgment for plaintiff. Defendant brings error. Affirmed.

James H. McFarlan (Farley & Selby, of counsel),
for appellant.

Carton, Roberts & Stewart, for appellee.

Plaintiff, as administratrix of her husband's estate, brought suit against defendant upon three promissory notes, which, with their indorsements, were as follows:

Exhibit 1:

"\$40.00.

LINDEN, July 24th, 1909.

"Sixty days after date I promise to pay to Fred Judson or order forty dollars for value received, with use at 6%.

[Signed] "WILLIAM PRATT."

Indorsed on the back of Exhibit 1 is the following:

"Sept. 23, 1913. Received fifty dollars on the within for interest."

Exhibit 2:

"\$600.00. LINDEN, October 28, 1909.

"On or before six months after date I promise to pay to Fred Judson or order, six hundred dollars, with use at 6 per cent.

[Signed] "WILLIAM PRATT."

On the back of Exhibit 2 is indorsed the following:

"Sept. 23, 1913. Received \$26.91 on the within to apply on interest."

Exhibit 3:

"\$75.00. November 8, 1909.

"On or before thirty days after date I promise to pay to Fred Judson or order, seventy-five dollars, use 6 per cent.

[Signed] "WILLIAM PRATT."

On the back of Exhibit 3 is indorsed the following:

"Sept. 23, 1913. Received twenty-five dollars on the within for interest."

The plea was the general issue with notice of the statute of limitations and a further notice of set-off, accompanied by a bill of particulars of said alleged set-off. Upon the trial defendant withdrew his plea of set-off and the case went to hearing upon the sole defense that recovery upon the notes in suit was barred by the statute of limitations. The notes bore date in July, October and November, 1909, and suit was not begun until November 6, 1917, so that, unless the indorsements upon the back of the notes bearing date September 23, 1913, evidenced voluntary payments thereon made by the defendant to the payee in the notes, they were clearly barred by the statute. At the beginning of the trial the notes in question were, over the objection of defendant's counsel, admitted in evidence, and, likewise, over objection, the evidence of George H. Judson, a brother and one-time partner of plaintiff's decedent, to the effect that the

indorsements upon said notes were in the handwriting of plaintiff's decedent, was received. Plaintiff's counsel were thereafter permitted to show by the witness, George H. Judson, from the car book record kept by Judson Bros., the following purchases from and deliveries by defendant Pratt:

"April 25, 1913.....20,840 lbs. straw
 June 21st, 1913.....17,490 lbs. straw
 September, 1913 17,870 lbs. hay
 September 13, 1913.....21,330 lbs. hay"

Plaintiff's counsel also were permitted over objection to introduce Exhibits 4 and 5 as follows:

"Exhibit 4.

Gaines JUDSON BROTHERS' ELEVATORS Linden
 Hay, Grain, Beans, Wool, Farm Machinery,
 Cement, Lime, etc.
 Union Tel. No. 24.
 Linden, Michigan.

Sept. 23, 1913.

179.84

25

21330 lbs.

17870

17490 straw

39200

20840

9

38330

2)352800

550

176.40

191650

105.35

191650

281.75

2)2107150

179.84

105.85

Indorsement 101.91

75

26.91"

208—Mich.—19.

Exhibit 5.

"HOLLY, MICH., Sept. 23, 1913. No....

"FIRST STATE & SAVINGS BANK, 74-391.

"Pay to Wm. Pratt or bearer, \$179.84, one hundred seventy-nine 84/100 dollars.

"JUDSON BROTHERS."

(Bank Stamp—Paid, Sept. 26, 1913.)

Touching Exhibit 4, George H. Judson testified as follows:

"Q. What is that, Mr. Judson, Exhibit 4?

"A. Why, it is a settlement between Mr. Pratt and Judson Brothers, for a certain amount of hay and straw bought.

"Q. And, will you state what its date is?

"A. September 23, 1913. * * *

"Q. Mr. Judson, were you interested in the matter of that computation yourself?

"A. Yes, sir; I was.

"Q. Now, what is that Exhibit 4?

"A. It is a settlement of hay and straw with Mr. Pratt.

"Q. How much money was figured in that computation that was due for hay and straw, how many dollars and how many cents?

"A. \$281.75.

"Q. I now show you Exhibits 1, 2 and 3, and ask you to testify what the date of the indorsements are?

"A. The date of each indorsement is September 23, 1913.

"Q. Now, does it show the fact of any check being given or anything of that kind, or any amount of money paid to anybody?

"A. It does.

"Q. What does it show about that?

"Mr. McFarlan: Your honor, I object to the form of the question. I would like to have the witness read what that paper contains and not what the inference from it may be.

"Q. Read that paper, Mr. Judson.

"A. Well, in the first place, there seems to be 39,200 pounds of hay.

"Mr. McFarlan: Does it say 'hay'?"

"A. No, it does not say 'hay.'

"Q. Well, just read what is on there, George.

"A. 21,330 pounds.

"Q. Yes, sir.

"Q. 17,870; 39,200. Those pounds are multiplied by nine, and the result is divided by two. That gives—

"Q. What result?

"A. The result is \$176.40.

"Q. What are the rows of figures?

"A. On the right hand side of the paper, 17,490 pounds of straw; 20,840 pounds. Add it together makes it 38,330. That same is multiplied by 550 and the result is divided by two, giving \$105.35.

"Q. \$135.00, is it?

"A. 135—five.

"Q. Is it pointed off in decimals?

"A. Yes, sir; it is pointed off.

"Q. What decimal is where?

"A. Between the thirty-five and the hundred five.

"Q. Is there any computation or anything occurring on that paper where \$178.00 and \$105.00 is added together or anything of the kind?

"A. There is.

"Q. What does it say about that?

"A. \$176.40 and \$105.35 are added together, and there the dollar sign is used.

"Q. How much?

"A. \$281.75.

"Q. Is there anything else on the paper?

"A. Over at the side, there is subtracted \$179.84.

"Q. \$178.94?

"A. Yes, sir.

"Q. Is there any further computation thereon?

"A. That leaves \$101.91.

"Q. Is that indicated or is it identified by any word?

"A. Yes, sir.

"Q. What does it say?

"A. The word 'indorsement.'

"Q. Where is the word 'indorsement' written?

"A. At the left of the sum.

"Q. And that sum is what?

"A. \$101.00—\$101.00.

"Mr. Selby: Now, so that the record may show, your honor, we having made objection all the way through, I now move to strike the exhibit and all evi-

dence given in regard to it from the record as incompetent and immaterial.

"The Court: No, it may stand.

"Q. I have shown counsel Exhibit 5. I now offer Exhibit 5 in evidence.

"Exhibit 5.

"Holly, Michigan, September 23, 1913. The First State Savings Bank, pay to William Pratt, or bearer, \$179.84," in figures; "one hundred seventy-nine and 84/100 dollars," in writing. Signed, "Judson Brothers." And, indorsed on the back is "William Pratt."
* * *

"Q. Now, Mr. Judson, taking into consideration the amount of the indorsement, made on Exhibits 1 and 2, and the amount of the check, marked Exhibit 5, and I ask you whether or not those indorsements total, together with the check in the aggregate, indicate such a sum as was due on Exhibit 4? * * *

"A. I say that the check, for \$178.84, was given to Pratt and cashed by Pratt."

And on cross-examination:

"A. I know that hay was bought of William Pratt and delivered by William Pratt's teams.

"Q. You don't know, however, what farm it came from?

"A. No, I could not tell you.

"Q. Could not tell anything about that?

"A. I would not tell you that, if I did not know.

"Q. That is all. * * *

"Q. That is all, just a moment, Mr. Judson. You do not know, of your own knowledge, of Mr. Pratt consenting to any indorsements?

"A. No, sir; I do not."

Plaintiff, administratrix, was permitted to testify that she found Exhibit 4 together with the notes in the safe where she had put it in the lifetime of her husband.

Defendant offered no testimony. Each party moved for a directed verdict. Both motions were overruled, the court submitting the case to the jury under a charge in the course of which he said:

"And you may take the notes and the check, if you have not done so, and compare them, as to whether or not the same man received the money on the check that signed the note, which would be evidence to you of whether or not Mr. Pratt received the \$179.84, which is borne out as the payment in the check. And if Mr. Pratt received the \$179.84, whether Mr. Pratt knew—was present and knew that the balance of the amount of that hay and straw, to wit: \$101.91, was credited to his account and indorsed upon these three notes.

"And I charge you, if you find that he was present and knew that that was being credited, that he was being credited with \$101.91 upon his notes, receiving the balance of \$179.84 as payment in full for his hay and straw, then you may take that into consideration, as to whether or not Mr. Pratt knew at that time that the indorsements were made upon the notes."

The jury returned a verdict in favor of the plaintiff.

BROOKE, J. (*after stating the facts*). Section 12335, 3 Comp. Laws 1915, provides:

"Nothing contained herein shall alter, take away or lessen the effect of a voluntary payment of any principal or interest, made by any person; but no indorsement or memorandum of any such payment written or made upon any promissory note, bill of exchange, or other writing by or on behalf of the party to whom such payment shall be made, or purport to be made, shall be deemed sufficient proof of the payment, so as to take the case out of the operation of the provisions of this chapter."

The first assignments of error argued by defendant are those relating to the admission of the notes in question in evidence. The case of *Rogers v. Anderson*, 40 Mich. 290, is cited, where it is said:

"Unexplained indorsements of payments could not be received as evidence, so as to take the case out of the operation of the statute."

Counsel for defendant emphasize the words: "Could not be received as evidence." These words should be read with the context, and, so read, the meaning simply was that the statute itself declares that the indorsements themselves are not sufficient proof of payment so as to take the case out of the operation of the provisions of the statute. The statute does not make the indorsements incompetent as evidence but declares them to be insufficient. In any event the objection goes merely to the order of the proof, as after the admission of other evidence in the case the notes with their indorsements would have been admissible.

A second group of assignments of error relative to Exhibits 4 and 5 are argued and it is asserted that all testimony touching the said exhibits should have been excluded, counsel saying:

"Without any proof of Pratt's presence; without proof of any knowledge on Pratt's part; without any proof of Pratt's assent, the plaintiff, against defendant's objection, was allowed to call this proof of payment sufficient to take the case out of the statute."

We are of opinion that Exhibits 4 and 5 were admissible in evidence; that they were properly identified by the witness, George H. Judson, and that his testimony touching the same was competent. Its weight was of course for the jury. Whether the exhibits in question bearing date the same day as the indorsements upon the notes, taken in connection with the defendant's indorsement of the check, Exhibit 5, and the payment of said check three days later, were sufficient evidence that defendant had voluntarily paid plaintiff's decedent both the amount of the check and the amount shown by the indorsements on the notes, by the delivery of this hay and straw, was peculiarly a question of fact for the determination of the jury.

Complaint is made of some portions of the charge

of the court. Taken as a whole, and, particularly, in view of the part thereof quoted, we believe that the jury were not misled as to the controlling question of fact to be determined by them.

The judgment is affirmed.

BIRD, C. J., and SHARPE, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

LIVERNASH v. DELORME.

1. EVIDENCE—PEDIGREE—BAPTISMAL CERTIFICATE—ADMISSIBILITY.

In ejectment, where the question of defendant's pedigree was involved, a certificate of baptism issued by a church according to its custom and kept by the alleged parents in the family bible until their death, is admissible, where verified by an eyewitness to the baptism, and its weight is for the jury, although it is not a church record, nor, in a legal sense, an ancient document implying an age of over 30 years.

2. SAME—STATEMENTS OF PARENTS.

Proof of statements and admissions of the alleged parents that defendant was their child, *held*, admissible.

3. SAME—POSITIVE TESTIMONY—SECONDARY EVIDENCE.

Testimony of a witness that she knew that the alleged mother of defendant was not her mother, where full of inconsistencies and contradicted by other witnesses, *held*, not such positive testimony as to exclude secondary evidence, and its weight was properly for the jury.

4. SAME—STATEMENTS OF MOTHER AT TIME OF BIRTH OF CHILD.

Statements of the alleged mother as to the birth of defendant, made about the time she was born, the mother now being dead, *held*, admissible.

5. PARENT AND CHILD—LIVING TOGETHER—PRIMA FACIE EVIDENCE.

The existence of the relation of parent and child is a question of fact, and is established *prima facie* where it is shown that the parties lived together, and recognized by their acts the existence of that relation.

6. WITNESSES—CROSS-EXAMINATION — REPUTATION IN COMMUNITY AS TO BEING DAUGHTER OF ALLEGED PARENTS.

Where a witness had testified that defendant grew up in a certain community and was always known by the name of her alleged parents, it was not error to allow, on cross-examination, questions as to whether she was known as their daughter, and as to whether they held her out as their daughter.

7. TRIAL—ARGUMENT OF COUNSEL—CURING ERROR.

In ejectment, where the question of defendant's pedigree was involved, argument by her counsel that plaintiff was seeking to "bastardize this girl," and that her good name was involved, *held*, not reversible error, where the trial court sustained plaintiff's objections, and stated that defendant's legitimacy was not involved, but only the question as to whether the alleged father and mother were her parents.

Error to Gogebic; Barton (Joseph), J., presiding. Submitted October 24, 1919. (Docket No. 12.) Decided December 22, 1919.

Ejectment by George H. Livernash against Leo W. DeLorme and another. Judgment for defendants. Plaintiff brings error. Affirmed.

Belmont Waples (Harold J. Waples, of counsel), for appellant.

James A. O'Neill, for appellees.

STEERE, J. This is an action of ejectment tried in the circuit court of Gogebic county, involving possession of and title to a property in the city of Ironwood described as the southerly 90 feet of lot 12 in block 4 of said city, according to the recorded plat thereof,

together with the appurtenances thereon. The trial resulted in a verdict and judgment for defendants and plaintiff brings the case to this court for review on various assignments of error. Both parties claim title through one Harvey W. Darrow, deceased, who died a widower and intestate on August 2, 1914, in his home on the property in dispute where he was residing with Ethel DeLorme, then, and always before her marriage to defendant Leo W. DeLorme, known as Ethel Darrow and recognized by deceased as his daughter. Plaintiff claims title by mesne conveyances under a deed from George W. Darrow, a brother of deceased, who resided at Necedah, Wisconsin, and held a trust deed of the property to him from four other brothers with their wives and three sisters of deceased, all adults residing in various other States. Defendant Ethel Darrow-DeLorme claims title as the daughter and sole heir at law of deceased. The case turns upon the question of whether she is his daughter, which plaintiff denies.

Varied only in minor details the introductory and practically undisputed facts are in outline as follows: Harvey W. Darrow, deceased, was for many years a merchant in the village of Hurley, Wisconsin, just across the river and State line from the city of Ironwood, and in 1892 was married to Elizabeth Darrow, sometimes called Eliza. They belonged to and were regular attendants at the Methodist church in that village for many years. Before March 1, 1895, Mrs. Darrow left Hurley and was absent from home for some weeks, just how long is not clearly shown. After her return they had defendant Ethel in their home, then a very small infant, whom they apparently recognized as their offspring, whose age is variously stated by the living witnesses who first saw her there as from a few days to a few weeks. She was presented for baptism in the Methodist church at Hurley

on March 1, 1895, and baptized as the infant daughter of Harvey W. and Elizabeth Darrow. From that time until the death of Elizabeth Darrow she lived in the home of Harvey and Elizabeth Darrow, was cared for, known, recognized, educated and introduced to others as their daughter and always so known and understood in the community where she grew up and in the schools she attended. After Elizabeth's death she resided with Harvey Darrow as his daughter in their home until his death. After the death of Harvey, proceedings were instituted to probate his estate in the probate court of Gogebic county on petition of Alfred H. Darrow, a brother, in which the claimed parentage of Ethel DeLorme was denied and an order entered by the court determining the heirs of said deceased to be his eight brothers and sisters. Defendant Ethel kept possession of and continued to reside in the home in which Harvey W. Darrow died, claiming it as his daughter and heir until these proceedings were brought.

The issue of her parentage was submitted to the jury by the court, and under plain instruction that the narrow issue of fact for them was whether or not Ethel DeLorme was the born child of Harvey W. Darrow, advising them that the record evidence showed, by the probate court proceedings and mesne conveyances, the legal title stood in plaintiff; and that under their special notice of defense it was incumbent upon defendants to show by a preponderance of evidence that Ethel DeLorme was "the own daughter of Harvey W. and Elizabeth Darrow." That sole issue was submitted to the jury by a special question in writing, to which the jury answered over their signatures, "Yes."

Plaintiff's counsel by motion and request upon the trial, followed by motion for a new trial, with properly preserved exceptions, urged a directed verdict in

his favor on the ground that "hearsay statements in favor of the defendants could not prevail against positive testimony in his (plaintiff's) behalf that Mrs. DeLorme was not the daughter of Mr. and Mrs. Harvey W. Darrow." Apparently the only fault found with the charge is refusal of the court to direct a verdict as requested. That proposition is closely related to plaintiff's various assignments of error on admission of testimony against objection which, it may be conceded, if inadmissible and rejected, would leave defendants with scant proof. The objections are directed against testimony to statements, representations or holding out by Harvey W. Darrow and wife that they were the parents of the girl, Ethel Darrow, all evidence of general reputation and understanding in the community to that effect, the admission of her baptismal record, letters from Harvey Darrow to her with the addresses, descriptive beginnings, conclusions, etc., a letter from Ida Myers, a living sister of Darrow, addressing her as "niece," and other somewhat similar items of claimed hearsay evidence.

Of the letter from Ida Myers, we think it sufficient to state that she was a party in interest, had joined with her brothers and sisters in the trust deed to George W. Darrow who apparently deeded to plaintiff for the purpose of this litigation, which was commenced shortly thereafter, and Alfred Darrow, on whose petition his brothers and sisters were determined the heirs of Harvey Darrow in the probate court, testified that plaintiff paid no consideration for the deed and was not to pay anything until the case was settled and "if the title is wrong wouldn't be expected to take it." This witness also testified that it was "a general understanding" in the Darrow family that the girl Ethel was not the daughter of Harvey, while this family letter written *ante litem motam* by a sister now interested to the contrary shows she

then designated deceased and Ethel as "Dear brother and niece," concluding, "Lovingly sister and aunt Ida."

The baptismal certificate objected to reads as follows:

"This certifies that Ethel Eliza, infant daughter of H. W. and Eliza Darrow, born in Hurley on the first day of March, 1895, having been presented for Holy Baptism and it having been solemnly promised that she shall be taught the nature and end of this Holy Sacrament, and all other things which a Christian ought to know and believe in order to lead a virtuous and holy life, was this day baptized by me in the name of the FATHER, and of the SON and of the HOLY GHOST according to the Discipline and Usages of the Methodist Episcopal Church.

(Signed) "E. T. BRIGGS, Pastor M. E. Church.
"1895."

This was produced and identified by Mrs. DeLorme as her baptismal certificate which had always been kept in the family bible of her claimed parents ever since she could remember and was there at the time of the death of Harvey W. Darrow. It was shown that she was raised by them in the Methodist faith and was a member of that church, that it was the custom for clergymen of that church to issue certificates of baptism. Mrs. McCamus, who had lived long in Hurley and knew Mr. and Mrs. Harvey W. Darrow for about 24 years, testified that she belonged to and attended the Methodist church there, as they did also, that she had known Ethel since she was a baby, was present in the Methodist church when she was baptized by Mr. Briggs, who was its minister at that time, that the baby so baptized continued to live in the household of Mr. and Mrs. Harvey W. Darrow as their child and was called Ethel Darrow, from that time until Mrs. Darrow died, and with Mr. Darrow until he died; that one pleasant morning while Ethel was yet a baby, witness was passing the Darrow home and saw

Mrs. Darrow out in the yard with her. They talked about the baby with some pleasantries in regard to her and witness remarked that she resembled her father, to which Mrs. Darrow replied: "Why shouldn't she look like her father? She is Harvey Darrow's own child," and in their following conversation told how low she was at the time Ethel was born, saying, "I like to have died. They despaired of my life"; that witness had been a nurse and on later occasions was called to Mrs. Darrow's home to care for her, at which times Mrs. Darrow more than once made mention of the child's birth.

As argued by plaintiff, it may be conceded that this certificate of baptism is not shown to be a church record nor in a legal sense an ancient document, which implies an age of over 30 years. Neither would it in any event be conclusive evidence standing alone of parentage or date of birth (*Durfee v. Abbott*, 61 Mich. 471), but we think the undisputed circumstantial evidence bearing upon its authenticity rendered it admissible for the jury to consider in connection with all other testimony in the case and give such weight as they deemed it entitled to. It was circumstantially verified by the direct testimony of an eyewitness that defendant Ethel was actually baptized when an infant about the time it indicates, in the Methodist church at Hurley by Mr. Briggs, the then pastor; that for many years, and always since Mrs. DeLorme could remember, it had been kept by Harvey W. Darrow and wife in the family bible at their home where it remained until after both were deceased, by permissible inference preserved in the family bible as a family record and recognition by them of its verity in a sense and to a degree with like solemn import as though the facts it stated had been recorded in that sacred book—of all which the weight and significance were for the jury.

Counsel on the respective sides are apparently not in disagreement as to the rule recognizing the admissibility of hearsay evidence in issues of this nature, based on the difficulties of establishing descent by direct testimony of eyewitnesses to marriage and birth, according to the strict rules of primary evidence. For which reason in cases involving pedigree recourse has long been permitted "to a secondary sort of evidence; the best the nature of the subject will admit; establishing the descent from the only sources that can be had." *Vowles v. Young*, 13 Ves. 140. But it is contended for the plaintiff that all proof of statements and admissions of Harvey W. Darrow and his wife in whatever form, orally or by letters, was hearsay evidence and incompetent, because "positive testimony to the contrary of a living witness who knows the facts" was introduced by plaintiff on rebuttal to the defense. That witness as pointed out in plaintiff's brief is Mrs. Mary Langford, who, it is stated, "testified that she knew Mrs. Eliza Darrow well just before Ethel first appeared and that Mrs. Eliza Darrow was not Ethel's mother." An examination of her testimony shows that she had no first knowledge of where and when Ethel was born and made her positive assertions largely on inferences of facts in dispute and hearsay. She had not lived in or near Hurley for over 16 years before she was a witness, but when residing there prior to that time knew Mr. and Mrs. Harvey W. Darrow. She was then a seamstress, and testified that on April 10, 1895, she was sent for by Mrs. Darrow to do some sewing for her when she for the first time saw Ethel, then an infant whom she judged about four weeks old, lying in a rocking chair; that a nurse was there whose name she did not know but who only stayed between trains; that witness understood from what the nurse said the baby was born March 10 and came from a home in Chicago. She

did not remember ever having talked with Mrs. Darrow about the parentage of the child, but knew Mrs. Darrow was not its mother, that she did not know of her bearing a child within six months before that time, and thought she would have known of it if such were the case. On cross-examination she testified:

"This child was brought to Hurley by a nurse; that is my understanding. * * * I wasn't there when the child was brought. I don't know whether or not Mrs. Darrow came back with the child. * * * I don't know personally who brought the child there, or, of my own knowledge, when she was brought there or who the mother of the child is. I know she was raised as Ethel Darrow and known in the community as Ethel Darrow and baptized in the Methodist church at Hurley. * * * I didn't charge my mind with any of the facts connected with the parentage of this child."

Having stated she didn't know whether or not Mrs. Darrow came back with the child, she later asserted she knew she was not absent from Hurley at any time during the three months prior to April 10 and was basing her answers on the theory that she was not absent during that time. She did not remember the day of the week April 10 came on, but remembered that date because it was shortly before her marriage, which took place June 19. Asked how many times she saw Mrs. Darrow in the three months before April 10 she answered, "once a week in church," and later answered she did not remember if she saw her the Sunday before that date, or the second Sunday before then, or the third, and afterwards said, "I know that I saw her the week before I saw this child, that Sunday at church." In view of the many inconsistencies in her own testimony and direct contradiction of facts testified to by other witnesses it was manifestly for the jury to pass upon what credence should be given to the assertions of this witness.

The record also contains substantive testimony not bare hearsay which if believed tends to show Mrs. Darrow was the mother of this child. Mrs. Sullivan, who knew Mrs. Darrow well from the time she was married until her death, and Ethel since she was a little baby, stated in reference to Ethel's first appearance in Hurley that Mrs. Darrow, who was a large woman, was "unusually large" before she went away about the first of February, was absent several weeks and "came back with her baby," at which time "she was much smaller," that in conversations upon the subject Mrs. Darrow told her she was never so sick as when Ethel was born and nearly died.

In the recent case of *Kotzke v. Kotzke's Estate*, 205 Mich. 184, it is said:

"The question of pedigree being involved and plaintiff's mother being deceased, we are impressed that her statements made about the time the child was born and when there was no probability of untruthfulness on her part and nothing to prompt her to conceal the facts from the members of her own family, were not objectionable within the hearsay rule but were admissible."

It stands practically undisputed that Ethel lived from early infancy in the Darrow home with Harvey W. Darrow and wife in the relation of parents and child, treated and recognized by them in word and act as their daughter. In 29 Cyc. p. 1583, the relation of parent and child in general is thus stated:

"The term 'parent and child' is used to indicate the relation existing between husband and wife, or either of them, on the one hand, and their legitimate offspring on the other. The existence of the relation is a question of fact, and is established *prima facie* where it is shown that the parties lived together, and recognized by their acts the existence of that relation."

Upon the vital point plaintiff also produced admissible hearsay testimony to the contrary of that produced by the defendants, and, as we view it, a clear issue of fact was made for the jury. As this court is only concerned with the admissibility and sufficiency of defendants' testimony to raise an issue for the jury it is unnecessary to review that of plaintiff or consider the claims of the respective sides as to the convincing qualities of their testimony and weakness of that opposed.

Counsel cite but two instances in the record where objection was made to admitted testimony claimed objectionable on the ground its purport was to prove general reputation in the community. Francis Jewell, a witness for plaintiff, testified on cross-examination without objection to several apparently undisputed facts and said: "This baby grew up to be a young woman in Hurley and was always known to the community as Ethel Darrow. Q. As the daughter of Mr. and Mrs. Darrow?" to which plaintiff's counsel objected on the ground "that rumor and reputation are immaterial in cases of this sort and do not tend to establish pedigree." The objection being overruled the witness answered "Always." In the other instance a witness of plaintiff was asked on cross-examination, "Q. And she was known and held out by the parents as Ethel Darrow, their daughter, during all that time?" To which objection was interposed on the ground that "a holding out doesn't tend to establish pedigree." The objection was overruled and the witness answered:

"Yes, Mr. and Mrs. Harvey Darrow were regular attendants at the Methodist church in Hurley both before and after this baby came and they took her to that church always and she grew up in the Methodist faith."

While these generalizing questions are perhaps near the border line, in view of the connection in which they were asked on cross-examination, and other volunteered testimony of similar import not objected to or moved stricken out, we find no reversible error in the ruling.

The remaining argued assignment of error is directed against two claimed prejudicial comments of defendants' counsel, who on opening the case to the jury stated defendants proposed to show no one ever questioned the legitimacy or parentage of the girl until her parents were dead and left her property which the brothers and sisters, particularly Alfred Darrow, wanted, and to that end he was seeking to "bastardize this girl,"—to which plaintiff's counsel objected, saying there was no claim "Mrs. DeLorme is illegitimate or a bastard." The court sustained the objection, with the further comment that counsel's opening statement must not be argumentative. In summing up the case to the jury defendants' counsel while arguing its importance to Mrs. DeLorme said, "but it involves all that is dear to this girl in the world. Irrespective of what these gentlemen on the other side say, it involves the good name of this woman, which is a more priceless heritage than any property which Harvey W. Darrow left," and counsel for plaintiff then objected to that line of argument, saying that there was no claim on the part of plaintiff "which in any way involves the legitimacy of Mrs. DeLorme." The objection was sustained, the court saying,—apparently to or at least in the presence of the jury,—

"Mr. is misstating the position of the plaintiff in this case in arguing that the legitimacy of the child is involved. That is not true. The question is whether Harvey W. Darrow and his wife were the father and mother of this girl."

Counsel for defendants, argues in his brief with

some force that not only did the reprimand, or emphatic contradiction of the court, cure any possible prejudice which might otherwise arise from what was said, but the comment, so far as made and intended, was permissible argument in view of the testimony which plaintiff had introduced and claim made implying that Mrs. DeLorme when an infant was a waif or foundling taken out of some home in Chicago. Of this objection the trial court said in denying plaintiff's motion for a new trial:

"The 10th and 11th reasons relate to the alleged improper conduct of counsel for defendants in his opening statement, and argument to the jury. On both occasions complained of the court sustained the objection of plaintiff's counsel, and in so doing took occasion to correct any error that might have resulted. Plaintiff's counsel presented no requests to charge relating to this matter, and it must be assumed that they were content with the action taken by the court."

Finding no prejudicial error demanding reversal, the judgment is affirmed.

BIRD, C. J., and SHARPE, MOORE, FELLOWS, STONE, and KUHN, JJ., concurred. BROOKE, J., did not sit.

WOOLFITT v. HISTED.

1. TRUSTS—PASSIVE TRUSTS ABOLISHED—EXECUTED BY STATUTE OF USES.

Passive trusts are abolished by statute in this State, but where a deed is so worded as to create a passive or naked trust, the statute on uses and trusts (3 Comp. Laws 1915, § 11565 *et seq.*) executes it by forthwith passing the title to the beneficiary.

2. SAME—TITLE REMAINS IN GRANTOR IF BENEFICIARY DEAD WHEN EXECUTED.

If the beneficiary in a deed attempting to create a passive trust was dead at the time it was executed, said deed was void and the title remained in the grantor.

3. ESCHEATED ESTATES—PRESUMPTION OF DEATH.

Under 1 Comp. Laws 1915, § 329, if any person shall disappear and his whereabouts remain unknown for the space of seven years, etc., he shall be presumed to be dead.

4. TRUSTS—DEEDS—CONSTRUCTION—INTENT.

In a deed from a father to his son, the words designating him as "trustee for Katherine Smith of Chicago, Illinois," *held*, to import an intent on the part of the grantor to invest her with some beneficial interest in the property conveyed.

5. SAME—WRITTEN ACKNOWLEDGMENT OF TRUST BY GRANTEE—FRAUDS, STATUTE OF.

Written acknowledgment of said trust by the grantee supplements and confirms said deed, and satisfies the statute of frauds by the harmonious evidence in writing from both grantor and grantee of a passive or naked trust, which the statute executes by placing the legal estate in the beneficiary if then living.

Appeal from Bay; Houghton (Samuel G.), J. Submitted October 31, 1919. (Docket No. 114.) Decided December 22, 1919. Rehearing denied April 10, 1920.

Bill by Amos J. Woolfitt against Charles D. Histed to quiet title to land. From a decree for plaintiff, defendant appeals. Affirmed.

Victor Spike, for plaintiff.

Kinnane, Black & Leibrand, for defendant.

STEERE, J. Plaintiff sought by this bill and obtained a decree in the circuit court of Bay county, in chancery, quieting his claimed absolute title in fee to 40 acres of land in the township of Merritt, Bay county, described as the northwest quarter of the northeast quarter of section 30, town 13 north, of range 6 east. From that decree defendant appeals, claiming title to said land under a sheriff's deed issued to him on an execution in a suit he commenced by attachment against John B. Schabel of Tacoma, Washington, to whom defendant claimed said land belonged.

It was shown upon the hearing that for years prior to January 24, 1898, the 40 acres in question with other lands belonged to Balthaser Schabel, father of John B. Schabel, Rose Schabel-Weber, Josephine Schabel-Gerard and Katherine Schabel, the latter being the youngest. She gave birth to an illegitimate son on April 29, 1892, who died four years later. After his birth she left home and went to Chicago where her brother John found and took her back. She had assumed, or adopted, the name "Katherine Smith" and was thereafter so known and called by members of her family and others who knew and had occasion to refer to her. She left home again before the death of her child, and for over 20 years she has not been seen or heard of by any member of her family, or others, so far as shown, although efforts were made by the family through public officials and otherwise

to find her. On January 24, 1898, some time after her disappearance and about two years after the death of her illegitimate child, her father, Balthaser Schabel, then a widower and well along in years, made conveyances dividing up his realty among his children, giving 90 acres to his son John B., 40 acres to his daughter Rose Weber, 40 acres to his daughter Josephine Gerard and by quit-claim deed conveyed the 40 acres in question to his son "John B. Schabel, trustee for Katherine Smith of Chicago, Illinois." This 40 acres was near but not adjacent to the 90 which he conveyed to John in his own right. This deed was in short form, for an expressed consideration of one dollar, and without words of inheritance except as supplied by statute.

Plaintiff's claim of title is based on a deed to him from John, as "trustee for Katherine Smith," dated May 23, 1916, and a deed from the father, Balthaser, dated June 10, 1916.

The sheriff's deed relied upon by defendant is dated July 1, 1918. For years following the conveyances of 1898, given by Balthaser to his children, John kept and controlled the 90 acres given to him and the 40 in question conveyed to him as trustee for Katherine. He lived upon the 90 acres for some time with his family, farming the whole 130 acres, afterwards renting the same to various tenants, and on April 30, 1910, rented the 130 acres to defendant Histed for a term of five years by a written lease containing covenants of quiet and peaceable enjoyment. In the meantime John had moved to the State of Washington, and being desirous of selling his farm authorized an agent at Bay City to do so with the suggestion that negotiations might be had with defendant, then in possession under the lease, to surrender the same. A deal was consummated by which plaintiff early in 1911 purchased the 90 acres of John, having the deed therefor

made to his son Emerson, from whom he took a life lease. Some negotiations were had between defendant, plaintiff, and Fisher, the agent of John, relative to defendant's surrendering his lease, the details of which we do not regard of controlling importance as no agreement was reached.

On May 1, 1911, plaintiff commenced in the name of his son Emerson eviction proceedings against defendant before a circuit court commissioner and the case went by appeal to the circuit court. While this and other litigation between the parties was pending in the circuit court defendant Histed commenced an action by attachment against John, who was in Washington, claiming damages for breach of the covenant in his lease for quiet and peaceable enjoyment, causing an attachment levy to be made on the 130 acres, consisting of both the 90 which John sold to Woolfitt and the 40 acres in question here, at that time still standing in the name of John as trustee of Katherine.

On December 2, 1911, an adjustment between these parties of their then litigation was made by which plaintiff agreed to and did pay defendant \$550 in cash and surrendered to him a note of \$375 previously given for rent, in consideration of a surrender of the lease upon the 90 acres and a release of the attachment levy against the same in defendant's action against John. It was, however, provided in the stipulation they entered into that—

“This agreement will not affect the right of action in said attachment suit of said Histed against said Schabel, except in so far as the consideration recovered in this settlement applies upon the damages of said Histed.”

Histed thereafter pressed his attachment suit against John to a default judgment and made execution levy on the 40 acres standing in John's name as trustee, causing the same to be sold at sheriff's sale at which

he purchased the property, and secured the sheriff's deed under which he is defending.

While some effort is made in the briefs of counsel to argue the equities of the case we discover no appealing equities on either side. These parties were maneuvering at litigation length, as we view it, to get this 40 acres as cheaply as possible. So far as shown neither ventured in the project near the full value of the 40 which was assessed for \$2,400 in 1915. The record does not disclose which, if either, of these parties was in possession of the property in dispute when this suit was begun, but defendant in his answer also asks as affirmative relief by way of cross-bill that his title to the 40 acres, claimed under his sheriff's deed, be quieted and he be declared the owner in fee simple of said described land. Although his default judgment under attachment proceedings against John B. Schabel was taken March 28, 1912, and the property sold on execution sale June 1, 1912, according to the sheriff's certificate, no deed was secured from that officer by defendant until nearly two years after plaintiff had received his deeds of the property from Balthaser and John B. Schabel, the sheriff's deed on execution sale being dated July 1, 1918, and acknowledged July 3, 1918.

We think this case turns primarily on legal questions. The controlling ones debated in the briefs of counsel are whether, according to the rules of construction and evidence which under our practice obtain in a chancery court, the conveyance from Balthaser Schabel to John B. Schabel, trustee for Katherine Smith, created a trust, and if so the kind and effect.

Plaintiff's contention is that the deed to John B. Schabel as trustee created a passive or naked trust which by operation of the statute immediately vested the legal title in Katherine if then living, or if she

was then dead the instrument was without legal effect and void, leaving the title in the father, Balthaser; that Katherine is presumed to be dead, not having been heard of for more than 20 years, and, if it be assumed she was living when the trust deed was given, Balthaser as her only heir subsequently inherited the title from her, which by his conveyance of June 10, 1916, passed to plaintiff.

Defendant contends that the words following the name of the grantee in the deed create no trust, are only *descriptio personæ*, and therefore vest an estate in fee simple in John B. Schabel under section 11751, 3 Comp. Laws 1915, which provides:

• “It shall not be necessary to use the words ‘heirs and assigns of the grantee’ to create in the grantee an estate of inheritance; and if it be the intention of the grantor to convey any lesser estate, it shall be so expressed in the deed.”

In connection with this, counsel for defendant make the somewhat extreme statement that “none of the rules of construction are applicable to statutory deeds,” citing *Adams v. Fisher*, 143 Mich. 673, wherein the court held that the technical rule of construction that an *habendum* repugnant to the grant is void does not apply to deeds of statutory form, saying:

“The technical rule relied upon does not apply in construction of statutory deeds.”

The court also said:

“A person unskilled in the law would probably have no difficulty in determining that the deed actually means what complainant alleges to be its legal meaning and effect.”

In the instant case the suggestion is not far fetched that a person unskilled in the law would naturally and probably determine that a deed to John, “trustee for Katherine Smith, of Chicago,” was intended to give

her some interest or estate in the property which he was to hold as her trustee, whatever might be the technical rule of construction as to words of description. In this case not only is the grantee designated as trustee but the beneficiary he is trustee for is named, which to any person of understanding whether skilled in the law or not would be much more significant than the bare descriptive word "trustee" without any suggestion as to who it was for. The deed was recorded on or about the time it was given and defendant had constructive if not actual notice of it and its contents when he attached the land in his action against John.

It is undisputed that the deed to John does not create an active trust. If a trust is created at all it is a naked or passive trust, which is defined to be "a trust in which the property is vested in one person upon trust for another, and the nature of the trust not being qualified by the settlor, is left to the construction of the law." Bispham Principles of Equity (7th Ed.), § 54. Passive trusts are abolished by statute in this State, but where a deed is so worded as to create a passive or naked trust our statute on uses and trusts (chapter 221, 3 Comp. Laws 1915) executes it by forthwith passing the title to the beneficiary. *Burdeno v. Amperse*, 14 Mich. 91 (90 Am. Dec. 225); *Ready v. Kearsley*, 14 Mich. 215; *Everts v. Everts*, 80 Mich. 222; *Rothschild v. Dickinson*, 169 Mich. 200. Those questions are now settled in this State past discussion. If this deed by fair intendment understandingly expressed a passive trust in John B. Schabel for Katherine Smith, his sister, she became the *cestui que trust*, plainly designated by name, and by force of the statute title passed to her when the deed was given in 1898, if then living. If she was then dead the deed was void and the title thereafter remained in her father until he conveyed the same to plaintiff. *Skinner v.*

Grace Church, 54 Mich. 543; *Paine v. Boynton*, 124 Mich. 194. Seven years from the time she disappeared and her whereabouts remained unknown she was by statutory provision presumed dead; 1 Comp. Laws 1915, § 329. Her father was then her only heir and as such inherited the property.

Defendant's claim of title by execution sale under his judgment against John is necessarily based on and limited by the deed to John from his father, then of record, designating him as "trustee for Katherine Smith, of Chicago, Illinois." The natural meaning of such words to a person of ordinary understanding imports an intent on the part of the grantor to invest her with some beneficial interest in the property conveyed. It implies more than the bare suggestion of trusteeship for some possible unknown beneficiary. In *Railroad Co. v. Durant*, 95 U. S. 576, where a party was simply designated as "trustee" the court held it sufficient evidence of a trusteeship to admit parol evidence of its nature. But more in point, it was held in *Boardman v. Willard*, 73 Iowa, 20 (34 N. W. 487), that where a grantee named Woolston was designated in a conveyance as "trustee" it sufficiently indicated that he held title for an unnamed beneficiary, and he having acknowledged the trust by a verified petition asking for an injunction, an execution levy under a judgment against him individually created no lien on the interest of his *cestui que trust*, saying:

"This title being in Woolston, trustee, the judgment was not a lien thereon, nor was one created by the levy of the execution, for all the plaintiff obtained thereby was a lien on the interest of Woolston. If he had none the plaintiff got none."

In the instant case John Schabel distinctly acknowledged the trust in writing both in identified letters written by him and in signing his sworn testimony taken in this case by deposition, in the State of Wash-

ington, which is explanatory and positive to that effect. In a letter of May 26, 1916, from Washington to plaintiff's counsel he wrote:

"As to my having any interest in the forty I have none excepting as trustee for Katherine Smith."

And on June 21, 1917:

"I only held this deed on the forty as trustee for my sister, and when father deeded it she was gone and he said he would deed it to me as trustee for her, and that was all the clame I had in it, and father wanted her to have it as her shair," etc.

Counsel for defendant objected to these letters as self-serving statements of the grantee, not a party to the suit, in effect and with only "the force of oral testimony," and also to John's deposition as in its nature but oral testimony, claiming all were incompetent because oral testimony cannot be resorted to for the purpose of creating a trust in real estate. That question is argued at length with many citations of authority in the briefs of counsel on both sides. It may be conceded that a trust in real estate cannot be created by parol, but where the writings are obscure it has been frequently held in chancery proceedings that oral evidence is admissible to explain the circumstances and make more certain the existence of a trust. As we view this issue, however, it is unnecessary to review the cases cited and arguments of counsel, or to go into that interesting and somewhat complicated subject upon which some of the authorities seem difficult to reconcile, for in this case we conclude there is written evidence of the essentials of a passive trust. In 1 Perry on Trusts (6th Ed.), § 82, it is said in part:

"* * * The statute of frauds will be satisfied if the trust can be manifested or proved by any subsequent acknowledgment by the trustee, as by an express declaration, or any memorandum to that effect, or by a letter under his hand, or by his answer in

chancery, or by his affidavit, or by a recital in a bond or deed, or by a pamphlet written by the trustees, or by an entry in a bank-deposit book; in short, by any writing in which the fiduciary relation between the parties and its terms can be clearly read. And if there is any competent written evidence that the person holding the legal title is only a trustee, that will open the door for the admission of parol evidence to explain the position of the parties. * * * Nor is it necessary that the letters, memoranda, or recitals should be addressed to the *cestui que trust*, or should have been intended when made to be evidence of the trust."

In quoting the above we do not lose sight of the fact that the grantee in the deed is not primarily the creator of the trust, but the grantor who conveys the property. In this deed conveying 40 acres of land for a consideration of one dollar, Balthaser Schabel designated his son John as trustee for his absent daughter, and John's sister, who is described in the deed by name and last known place of residence. Why was that done? He, at the same time by separate deed, conveyed to John for himself, not designating him otherwise than by name, a nearby 90 acres for a consideration of one dollar. It would be a strained, unnatural and narrow construction to say the contemporaneous deed to him as "trustee of Katherine Smith, of Chicago, Illinois" was intended for and meant nothing more than a description of John. We think by fair construction the language of the deed itself expresses and gives notice of an intended passive trust in John for a named beneficiary, sufficient, at least, to warn and put upon inquiry; while written acknowledgment of the trust by John supplements and confirms the same, and satisfies the statute of frauds by the harmonious evidence in writing from both grantor and grantee of a passive or naked trust, which the statute executes by placing the legal estate in the bene-

fiary, if then living. She was in contemplation of law deceased at the time her father deeded the property to plaintiff in June, 1916, and in either aspect of the proposition he then had title.

The decree will stand affirmed, with costs.

BIRD, C. J., and MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred. SHARPE, J., did not sit.

JEWELL v. ROGERS TOWNSHIP.

1. HIGHWAYS AND STREETS—MUNICIPAL CORPORATIONS—FAILURE TO BARRICADE CLOSED HIGHWAY.

After having laid out, opened, improved, and maintained a road as a public highway for many years, it was the duty of the township and a quarry company which it permitted to destroy the same by extending its quarry across it, to effectually exclude public travel by barriers from that particular portion made impassable.¹

2. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE OF DRIVER IMPUTABLE TO PASSENGER IN AUTOMOBILE.

The negligence of the driver of an automobile is imputable to a passenger, and in an action for the death of the passenger it is incumbent to show, before recovery can be had, that no negligence of either caused or contributed to the accident.

3. HIGHWAYS AND STREETS—MUNICIPAL CORPORATIONS—INTOXICATION AS CONTRIBUTORY CAUSE—QUESTION FOR JURY.

In an action against a township and a quarry company for the death of plaintiff's intestate, a passenger in an automobile which ran into an excavation across a closed public highway, where there was evidence that deceased and the driver had been drinking beer in a saloon a short

¹On duty to provide barriers against abandoned highway, see note in 37 L. R. A. (N. S.) 1158.

time before the accident, the question as to what extent they were under the influence of liquor, *held*, for the jury under proper instructions.¹

4. SAME—CONDITIONS AS TO LIGHT—QUESTION FOR JURY.

In such case, where there was some conflict in the evidence as to the exact time the accident occurred, and whether it was then getting dusk, the question as to what extent the approach of night or evening shadows might affect the clear view of one driving along the highway, *held*, for the jury.

5. SAME—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In order to recover it was necessary for plaintiff to show that deceased was free from contributory negligence.

6. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In such action, where the testimony was very conflicting, the trial court properly held that the question of deceased's contributory negligence was for the jury.

7. NEW TRIAL—WEIGHT OF EVIDENCE.

Where the trial judge, who was familiar with the locality, and who heard and saw the witnesses, after twice reviewing the case, declined to disturb the verdict of the jury, or hold that it was against the great weight of the evidence, this court will not, on error, substitute its judgment for that of the jury or the trial judge.

8. APPEAL AND ERROR—HARMLESS ERROR—DAMAGES.

Where the widow testified that deceased earned \$100 a month, but on cross-examination replied that he worked on commissions, and all she knew was what he told her, it was not reversible error to refuse to strike same, where she further testified that he contributed to the support of herself and child an average of \$60 a month, and the expense of taking care of the child was \$15 a month, in view of the size of the verdict, which was only \$2,500, when compared with a possible estimate on that basis under his and her life expectancy.

9. DEATH ACT—DISTRIBUTION OF MONEY RECOVERED UNDER DEATH ACT TO WIDOW AND CHILD.

Under 3 Comp. Laws 1915, § 14577, it was for the probate court and not the jury to determine the proportion to be distributed to a mother and son of money recovered under

¹Or intoxication as affecting negligence with relation to persons injured on highways, streets, etc., see notes in 40 L. R. A. 138; 47 L. R. A. (N. S.) 737, and L. R. A. 1916F, 102.

the death act in an action for their benefit for the death of the husband and father.

10. SAME — VERDICT APPORTIONING DAMAGES — CURING ERROR BY PUTTING VERDICT IN LEGAL FORM.

Although the foreman of the jury first announced that they had found "for the boy, \$1,500; for the widow, \$1,000; total, \$2,500," the verdict was not therefore illegal, where it was put into legal form by the court, and in answer to an interrogatory as to whether they assessed plaintiff's damages at \$2,500 against both defendants, they all answered "yes."

Error to Presque Isle; Emerick (Frank), J. Submitted October 8, 1919. (Docket No. 14.) Decided December 22, 1919.

Case by Edward Jewell, administrator of the estate of Raymond Jewell, deceased, against the township of Rogers and the Michigan Limestone & Chemical Company for the negligent killing of plaintiff's decedent. Judgment for plaintiff. Defendants bring error. Affirmed.

Henry & Henry, for appellant township.

G. Covey, Jr., for appellant company.

Homer H. Quay and *C. S. Reilley*, for appellee.

STEERE, J. This action was brought by plaintiff as administrator of the estate of his son, Raymond Jewell, a young married man, 22 years of age, who lost his life on May 16, 1917, through an automobile in which he was riding falling into the pit of a quarry belonging to defendant Michigan Limestone & Chemical Company at a point where it crossed an old highway in the defendant township of Rogers. The negligence charged in plaintiff's declaration is that defendants did not erect and maintain suitable barriers and warning notices effectually closing said road after exten-

sion of the Limestone & Chemical Company's quarry across it rendered it impassable and dangerous for public travel, of which fact defendants were fully informed at the time of the accident. At the completion of plaintiff's proofs and at conclusion of the testimony, defendants' counsel moved for a directed verdict in their favor upon the ground that deceased's own negligence caused or contributed to his death, pressing the claim also by requests to charge. These were denied and the case submitted to the jury, resulting in a verdict in plaintiff's favor for \$2,500. Before entry of judgment defendants' counsel moved the court under section 14568, 3 Comp. Laws 1915, for a judgment notwithstanding the verdict. The motion was denied and judgment entered on the verdict. Defendants assign 31 grounds of error directed to rulings on admission of testimony, charge of the court, and, especially, refusal to direct a verdict as requested.

Rogers township lies in Presque Isle county, of which the village of Rogers City is the county seat. Rogers City is in fractional section 15, town 35 north, of range 5 east, on the shore of Lake Huron, which in that locality has a general bearing northwest and southeast. On and near the lake shore about two miles southeasterly from Rogers City and near the site of an old location known as Crawford's quarry, is the extensive establishment of defendant Michigan Limestone & Chemical Co., called "Calcite," consisting of a large crushing plant, with numerous buildings of various dimensions, extensive dock facilities, many small dwellings for employees, etc., and a large limestone quarry extending southeasterly in favorable rock formation for over a mile, equipped with railroad tracks along its floor, steam shovels, drilling machinery and other appliances essential to extensive quarry operations. This is known as the Calcite quarry and

the defendant Limestone & Chemical Co. is also referred to as the Calcite company. The streets of Rogers City are not laid out with the cardinal points of the compass, but parallel to and at right angles with the shore of Lake Huron. Two gradually diverging roads lead in a southeasterly direction from the village for some distance, but eventually join some two and a half miles southeasterly from the village at the common corner post of sections 25, 26, 35 and 36 in said township, from which point a single road continues directly south along the section line towards Hagensville, Metz, Posen, and on to Alpena. The most westerly, called the "Third street road" is the direct and commonly traveled route. It runs southeast through the village and beyond in a straight line to where the roads come together. The other and older road on which the accident occurred, called the "Lake Shore," "Loop" or "Crawford's quarry" road leads from the village in a circuitous and more easterly route along the lake shore for near a mile past Calcite, or old Crawford's quarry, where it makes a sharp southwesterly turn and continues in that general direction to the quarter-post in the line between sections 25 and 26, thence south on the section line, to where it is diagonally joined by the Third street road at the common corner of the four sections before mentioned, from which point the old highway called the Metz road continues on south. A "short cut," about 100 rods in length, known as the "Wilson road" was also extended west across the angle to the Third street road from the quarter-post where the Crawford's quarry road turns south, connecting at right angles with the Third street road at a point over 1,600 feet above where it intersects the old shore road at the section corner. Before Third street road was opened this Crawford's quarry road was a part of the old Metz road to Rogers City, which was opened and im-

proved in an early day and for many years the main, if not the only, thoroughfare to that village from the south.

After the more direct way by Third street was improved the old shore road was comparatively little used, but was maintained as a public highway by the township, open and in safe condition for travel until, in the latter part of 1916, the Calcite company's quarry excavations working to the southeast intersected this road where it angles southwesterly across the northwest quarter of section 25 towards the quarter-post at which it turns south.

It appears that before opening its quarry across this road the Calcite company petitioned the highway commissioner of Rogers township for a discontinuance of the road and proceedings were taken by which said commissioner, on July 22, 1916, made and signed an order discontinuing that portion of the old road extending northeasterly through section 25 from its west to its north section line. This order and all official papers in connection with it remained in the hands of the Calcite company's attorney and were not filed with the township clerk until after the accident in May, 1917. The highway commissioner testified and it is admitted that the Calcite company agreed to put up barriers to guard the discontinued road and notify the public that it was closed. This the company did at the intersection of Third street and the Crawford quarry road, where it is claimed the highway commissioner directed the barrier and notice should be placed. It is undisputed that no barriers or notices were placed at the quarter-post half a mile north where the short cut, or Wilson road, strikes the Crawford quarry road, or where the short cut intersects the Third street road. There is abundant proof that the barrier, with notice upon it, which they did place where the Third street and Crawford quarry roads came together was not

substantial, or adequate, could readily be thrown down or removed, and that numerous witnesses passing that way either did not notice it at all or observed it was thrown down, outside of the traveled way. Charles Osgood, cashier of the Presque Isle County Savings Bank, who passed by there on the evening of the accident, testified no barrier was up at that time. George Endres, a business man of the village, testified he had at times seen the barriers in proper shape standing upon wooden horses across the road, but "the Sunday before the accident the barrier was down," and on the night of the accident he "placed the barrier and these horses as they had been before * * * to prevent anybody from duplicating the accident."

Otherwise than as invaded by the quarry operations the Crawford quarry road was a well built stone road, fit and in safe condition for travel, with the appearance of a used road. The place of this accident, where the quarry is excavated across the line of the old highway, is approximately two-thirds of the distance from the quarter-post where the road turns northeast and diagonals in that direction across the northwest quarter of section 35 to where it reaches the north line of said section. The discontinued highway as described in the proceedings for vacation is that small portion of the Crawford quarry road which runs diagonally in a northeasterly direction across the above described 160 acres from its southwest corner. In each direction the Crawford's quarry road continues as formerly, an improved highway legally laid out and open to public travel, so far as this record discloses. At the time of the accident the quarry at the place it crossed this road was 34 feet 5 inches deep, from the surface where the road ran to its brink on the south side or, as otherwise stated, that was "the distance from the edge of the cliff down to the floor or base of the quarry."

The two men, Wright and Jewell, who met their death in this accident, were sewing machine salesmen, or agents. Plaintiff's intestate, Raymond Jewell, was then living with his wife in Rogers City, having recently taken an agency from the Davis Sewing Machine Co. covering Rogers City, Alpena and other territory. Willard Wright, who owned and drove the car at the time of the accident, was a salesman for the Bruce Sewing Machine Co., whose field of operations was in the southern part of the State. He had driven a car during two years previous, mostly a Ford which he owned, and was an experienced driver. He had a cousin named Ellis Wright living in Alpena at whose house he stayed the previous night and on the day of the accident they went over to Rogers City together, each driving his own car, arriving there about noon. Ellis Wright testified that, so far as he knew, Willard had not previously been to Rogers City since 1915, at which time he rode over with him and they drove around by the Lake Shore, or Crawford's quarry, road.

In the afternoon the Wrights spent a couple of hours with a man named Hagle on some contract he had involving jobs situated at different places, and Ellis Wright rode with him around town for a time. Willard Wright and Jewell were also seen riding together at about 4:30 going north on Third street in a Ford car. Ellis Wright testified that "somewhere about 4 o'clock" he went with Hagle, Jewell and Willard to Adolph Mende's saloon where they "drank a little beer," talked together, told stories, had some singing and dancing and passed the time until between 5:30 and 6 o'clock when he went home with Hagle; that Jewell and his cousin were sober when they left them, and about an hour later on returning down town they heard the boys were killed and started down there in Hagle's car to see who it was, meeting a Mr.

Kitchen who told witness it was his cousin who had been killed. He estimated the time of their starting as "somewhere around 7 o'clock" and stated it "was just getting dusk."

Jewell and Wright appear to have left Mende's place and started on their fatal ride in Wright's car, which he was driving, not long after 6 o'clock. A barber named Londo saw them drive past his shop in the central part of the village at 6:15, driving as he judged about 15 miles an hour. Eugene D'Vincent, the county clerk, who knew Wright, had seen them riding together earlier in the afternoon and saw them passing his house on Frederick street coming up town from the direction of Mende's place at about half-past or "may be 20 minutes," after 6 o'clock, driving a "little fast" and noticed them turn the corner at Larke street, which joins Third street. He noticed the driver made the turn as a skillful chauffeur would and did not see anything peculiar about their conduct except "they came along at a fairly good rate of speed and made a good turn and one of the boys" slapped the driver on the back when he made the turn. A man named Wilson Pines who lived "in the second last building going out towards Metz" testified that he was out in his yard after supper to pick up some stuff for wood when his smallest child went out on the road and he heard somebody "give a yell out of them," and looking up he saw dust and an automobile coming. He called his child, going out into the road after him, and took him away, and the automobile passed at what he estimated as "between 30 and 35 miles an hour—something like that," and they yelled again just as they went by him. They were next seen by an employee of the Calcite company named Turner, who operated a drill at the quarry and was on the top of the cliff at the southerly edge of the quarry putting on his overalls to go to work, about five rods from where the old Craw-

ford's quarry road terminated at the cut and saw them go over. He first saw them when they were "about seven or eight rods" from the cliff, driving he "should judge about 25 miles an hour," and saw them plunge over it. He testified that it was then daylight, gave the time when he first saw them as "between five and ten minutes after seven" and did not observe that they slackened speed before the car went over. Both were dead at the bottom of the cliff on the floor of the quarry 34 feet below when he and a fellow workman ran to the edge of the quarry to see if they could help them. Why these men attempted to go over this road is but conjecture and of little significance. It was a comparatively short drive of but a few miles around this triangle back to Rogers City over a good stone road except for this deep quarry, cut across it by the Calcite company, and, so far as any public record showed, over a long opened and used public highway. If they turned northeast from the Third street road to the left towards the lake at where the short cut, or Wilson road, leads across to where it joins the Crawford's quarry road and along it northeast to the place of the accident, they went over a road upon which no warning notice or barriers were ever placed. If they went the longer way, continuing out the Third street road to its intersection with the Crawford's quarry road at the section corner, the inadequate barrier and notice which had been placed there were torn down that evening, and from there to the point at which the old road is claimed to have been discontinued is half a mile north.

After having laid out, opened, improved and maintained this road as a public highway for many years, permitting and inviting its public use as such, it was clearly the duty of the township and those it permitted to destroy the road at that point to effectually exclude public travel from that particular portion of

it made by them totally impassable and exceptionally dangerous by such fences, barriers and other means as would plainly warn travelers of the danger, and to maintain the same while such dangerous conditions were continued with an otherwise open, improved highway deceptively leading to the danger. This duty is sharply made manifest by the conditions shown here, where a deep, unguarded, sunken quarry was cut across this well-known highway by a private company, authorized so to do by the highway commissioner under incompleting steps to discontinue but a short section of a long and long-used legal thoroughfare, leaving the same with unmarked dead ends at each extremity of the portion proposed to be discontinued. The law is too well settled on that subject to call for discussion or citation of authority and there was abundant evidence to carry the question of these defendants' negligence to the jury.

The closer question to the merits of the case is the asserted contributory negligence of deceased. It is urged for defendants that facts not controverted entitle them to a directed verdict on that ground. Plaintiff's intestate was a passenger. He was riding with Wright who owned and drove the car. As to this the court very fully, emphatically and correctly charged the jury that the negligence of the driver was imputable to the passenger, and that it was incumbent upon plaintiff to show before he could recover that no negligence of either caused or contributed to the accident, that "if the negligence of Jewell or the negligence of the driver, Wright, either caused the injury or contributed to the injury—was a part of the cause of the injury, the plaintiff in the case cannot recover."

Counsel for defendants contend in the first place that the evidence that those men were intoxicated at the time of the accident is beyond controversy, particularly emphasizing what is stated to be the undisputed

testimony of an employee of the Calcite company named Pines who testified that he went into Mende's saloon that evening at about half-past 6 to get a pail of beer; that Wright, whom he knew, was there with Jewell; they were having a good time and singing, asked him to have something to drink and he drank two glasses of beer with them and they paid for his beer, including what he got in his pail; that he was not in there over five minutes, and "they were drunk at that time." On cross-examination he said he "took them for drunk," but there was nothing outside of their singing and joking. Jewell was shown to be a good singer who sang frequently on public and private occasions. In view of the testimony that these men drove past Londo's barber shop down town at 6:15, and up past D'Vincent's place at 6:20 or half-past six, as they describe, it was not for the court to accept Pines' narrative of events in Mende's saloon at half-past 6 as beyond controversy. These men are not shown to have drunk at all until after 4 o'clock that day, nor anything stronger than beer. That Wright was a good driver, could and did drive well and skillfully when last seen in the village, is undisputed. If and to what extent those men were under the influence of liquor was properly left to the jury with a plain instruction in substance that it was for them to decide that question from all the evidence in the case and determine whether and to what extent it affected their judgment or rendered them careless and reckless; and in its direct application whether by reason of such condition they, or the driver, failed to exercise the ordinary care and caution which a prudent and careful driver would exercise under like circumstances.

Defendants also emphasize the fact that these men drove over the cliff in broad daylight as impelling evidence of their negligence. Defendants' testimony

shows that it was yet daylight. There is some conflict in the evidence as to the exact time it occurred, and whether it was then getting dusk. Defendants' own testimony shows that it occurred about sundown. Turner gives the time as 5 or 10 minutes after 7, and John Marsters, superintendent of the Calcite company, testified the sun set at 7:12 on that date, that he went over to the scene of the accident a few minutes after 7 and it was "quite light at that time." How light and to what extent the approach of night or evening shadows might affect the clear view of one driving along that highway were purely questions of fact for the jury to determine and apply to the chief question of deceased's, or the driver's, negligence. It was so left by the court to the jury. Other things along the way as it approached the cut, of which defendants introduced testimony, are insisted upon as ample warning of danger ahead, and urged as conclusive evidence of contributory negligence—such as the fact the timber was cut away for about 500 feet back of the quarry, giving a view to one approaching on the road of the operations going on at that place, electric drills near the edge of the cut, steam shovels, engines, etc., down in the quarry; and about 105 feet back of the cliff a water pipe crossing it, a drill case, wires, poles and other things on or near the road, some of which were in the road and driven over by those men, and other similar evidence of operations furnishing argument against due care. These were referred to with considerable detail by the court in charging the jury and submitted as proper matters for them to carefully consider in their bearing upon the question of contributory negligence, from which plaintiff must show freedom in order to recover.

It was shown that the old Crawford's quarry road ran right to the edge of the cut, or cliff, with no traveled highway turning from it to the right or left; that

it was in as good condition and fit for travel there as other portions of the road except for the water pipe across it and four or five small poles over which Turner, who said the timber was cut back 7 or 8 rods, stated the automobile "bounced" as they approached the edge of the cliff, the poles, water pipe, etc., all being within 130 feet of the edge.

There was abundant evidence visualized by photographs that a person driving along the road in the direction these men were going could not see the quarry itself until within a very short distance of its almost perpendicular edge. How far back of the cliff was in dispute. A witness named Lozien, who worked for the Calcite company at the time of the accident, driving a team hauling sand and dynamite, and had stopped parties driving towards the quarry when they were within 200 feet of it, was familiar with and had teamed around that side of the quarry and testified that from the edge of the clearing, which he estimated about 500 feet back, a person could see no part of the quarry, not even its easterly edge or bank, and that a person going in that direction had to get within about 30 feet of it before he could see anything. These distances were disputed and there was testimony that the east edge of the quarry could be seen much farther back, but in any event the point upon the road at which it was possible to discover that the quarry was cutting across it was an issue of fact.

At defendants' request the jury was taken over the road by the sheriff to the place of the accident and viewed the premises under instructions from the court, being properly cautioned and advised that it was a permissible proceeding in the progress of a trial for the jury under direction of the court to view the premises involved to aid them in understanding the evidence given as to the physical locations of roads, etc.

In denying defendants' motion for a judgment not-

withstanding the verdict, and again in denying their motion for a new trial, the court reviewed the case at some length, pointing out and holding that the conflicting testimony made the negligence of plaintiff's intestate an issue of fact necessarily for a jury rather than the court; and that the court was not able to say the verdict was clearly contrary to the great weight of evidence, or the result of passion, prejudice or incapacity on the part of the jury to intelligently perform its duty. Citing upon this proposition *Krouse v. Railway*, 170 Mich. 438; *Silverstone v. Assurance Corp.*, 187 Mich. 333; *Mink v. Railway Co.*, 194 Mich. 324.

The record indicates a very full and fair trial with able counsel on both sides, before a jury whose intelligence and integrity are not questioned and who inspected the premises before passing upon the evidence. The trial judge, who shows familiarity with the locality and like the jury heard and saw the witnesses, after twice reviewing the case declined to disturb the verdict, or hold that it was against the great weight of evidence. After a careful examination of this record we find no occasion to substitute our judgment for that of the jury or trial judge. Plaintiff's intestate left a wife and son three years of age. When killed his expectancy of life according to the mortality tables which were introduced in evidence was 36 years, that of his wife was more. The court very fully and correctly instructed the jury upon the measure of damages, confining recovery by the plaintiff-administrator, if entitled to a verdict at all, to such sum as the evidence showed deceased would have contributed for support of his widow, and child during his minority. The widow in testifying to her husband's earnings gave them at one time as \$100 a month, but on cross-examination replied that his income was from commissions on sales and all she knew about it was

what he told her. Reversible error is urged on refusal of the court to strike out her testimony as to her husband's earnings. In the light of her further testimony that her husband had contributed to the support of herself and child an average of \$60 per month, and the expense of taking care of their child was about \$15 per month, and the size of the verdict compared with a possible estimate on that basis under his and her life expectancy, we regard the ruling complained of as immaterial.

Complaint is made that the verdict was illegal because the jury apportioned the amount of the verdict between mother and son, while the proportion to which each was entitled had a general verdict been rendered would be a matter for distribution by the probate court under the so-called death act 3 Comp. Laws 1915, § 14577.

The basis of this assignment of error is as follows: When the jury reported an agreement and returned into court to render their verdict and in answer to the court's inquiry the foreman stated they found for the plaintiff, the following questions were asked and answered:

"The Court: In what sum?

"The Foreman: For the boy, \$1,500; for the widow, \$1,000; total, \$2,500.

"The Court: \$2,500 against both defendants?

"The Foreman: Yes, sir."

The verdict was then put into legal form as a verdict for the full amount in favor of the plaintiff against both defendants, concluding:

"And you assess the damages of the plaintiff on occasion of the premises at the sum of \$2,500; so say you, Mr. Foreman?

"The Foreman: I do.

"The Court: And so say you all, gentlemen of the jury?

"The Jury: Yes, your honor, we do."

After which the verdict was entered by the clerk in regular form.

That the jury agreed to a verdict in favor of the plaintiff for \$2,500 is made plain by the foreman's first answer. The proposition as to how it should be divided was, as counsel suggest, outside the jury's duty or authority. For the court or clerk to put the verdict announced by the foreman in proper form before taking it as a finality is the usual course. This was done after the court concisely inquired and was told their verdict was for \$2,500 against both defendants. All the jury answered the interrogating announcement of their verdict as legally formulated in the affirmative. No request for a poll of the jury or objection to the course pursued was made by defendants' counsel at that time. We see little force in the objection as now made.

No reversible error is found and the judgment will stand affirmed.

BIRD, C. J., and SHARPE, MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

SMITH v. HYNEL

1. MASTER AND SERVANT—DEATH—NEGLIGENCE—COMPETENCY OF MAN IN CHARGE OF SAWMILL.

In an action for the death of plaintiff's decedent in a saw-mill accident, where the only testimony touching the competency of the man in charge was that he was a competent and careful man, there was no issue on that question for the jury.

2. SAME—SUFFICIENCY OF CREW IN CHARGE OF SAWMILL.

Evidence in support of plaintiff's contention that the crew in charge of the sawmill was insufficient, *held*, insufficient to go to the jury.

3. SAME—SAFE PLACE TO WORK—LEAVING SAFE PLACE CONTRARY TO ORDERS.

Plaintiff's contention that deceased was not furnished a safe place in which to work, *held*, not supported by the record, where the evidence shows that he was engaged as a setter in a safe place, but that unexpectedly and contrary to orders he left his position for that of tail sawyer and in attempting to return by crossing the carriage fell and was killed.

4. SAME—WORKMEN'S COMPENSATION ACT, DEFENSES NOT AVAILABLE WHERE MASTER NOT UNDER.

Where defendant employer had not come under the workmen's compensation act, the common-law defenses of assumption of risk, negligence of fellow-servant, and contributory negligence of the injured employee were not available under 2 Comp. Laws 1915, § 5423, unless such contributory negligence was willful.

5. SAME—EVIDENCE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

In the absence of evidence of negligence on the part of the employer, the kind or degree of the employee's negligence is immaterial.

6. SAME—EVIDENCE—SUFFICIENCY.

In such action, evidence *held*, insufficient to establish actionable negligence on the part of the employer.

Error to Livingston; Collins (Joseph H.), J. Submitted October 15, 1919. (Docket No. 47.) Decided December 22, 1919.

Case by Elmer L. Smith, administrator of the estate of Arthur H. Smith, deceased, against Fred T. Hyne for the alleged negligent killing of plaintiff's decedent. Judgment for plaintiff. Defendant brings error. Reversed, and no new trial ordered.

W. P. Van Winkle & Son, for appellant.

Louis E. Howlett, for appellee.

STEERE, J. On March 25, 1918, Arthur H. Smith, plaintiff's intestate, was instantly killed by a circular saw in front of which he fell while working as a setter in a small sawmill operated by defendant's employees in the township of Brighton, Livingston county. Deceased was a married man 59 years of age living in the village of Brighton, his occupation being varied. At times he worked at painting and carpentering and at times did various other kinds of work at odd jobs as he found employment. Defendant lived in the village of Brighton where he had been engaged for many years as a dealer in grain, produce, building material, etc., in partnership with his son. He owned and ran a large farm about four miles from the village, and with a nephew had for years owned a small sawmill located on his brother's farm about a mile from the main buildings on his farm. This mill was in a rough frame building some 50 feet long and 24 feet wide, in an open field five or six rods back from an easterly and westerly highway. It was only operated occasionally, at such times as they might wish to saw out some lumber, posts or other materials for their own use. In some years it was not operated at all and in others considerable sawing was done. A barn had burned on defendant's farm which he proposed to replace and preparatory to so doing had during the winter cut logs from a wood lot of his farm and hauled them to the mill to be sawed into timber and lumber for use in the construction of the barn.

Smith, the deceased, had done work for defendant at various times and for some days prior to the starting of this mill was working on defendant's farm trimming trees and other odd jobs, among which was fixing some windows in the mill at the instance of defendant's son, Erwin Hyne, who was in charge of preparing the mill for sawing and subsequently ran it as head sawyer. He was a man some 32 years old

who had worked in and run this mill from time to time on previous occasions when it was in operation. He asked Smith if he had ever worked in a sawmill, to which he replied he had a good many years ago when a boy. He was told when the mill would start and on that day appeared with his dinner pail ready to work. Erwin Hyne in arranging his crew told Smith he wanted a setter and explained to him the duties of a setter in connection with the appliances to be used. Smith accepted the position, readily understood and efficiently performed his duties until the accident on March 25th.

The mill started sawing on March 21, 1918. It was a small, simple mill, operated by a crew of four men, consisting of Erwin Hyne as head sawyer, William Standlick as engineer, his brother, Charles Standlick, as tail sawyer, and Smith, the deceased, as setter. A traction engine furnished the power which was transmitted to the mechanism of the saw by a belt. The single circular saw was 50 inches in diameter, located in the east end of the mill, with the engine in the west end. The logs to be sawed were piled outside at the easterly end of the building which was open, allowing the carriage track to extend out some distance beyond. The carriage was located on an iron track at the north side of the saw. The track extended more than the length of the carriage beyond the east end of the building and into the building some 20 feet west of and beyond the saw. The carriage ran back and forth along the track on four wheels, its movements controlled by levers manipulated by the head sawyer, and could be run out of the east end of the building far enough to place logs on it as needed. As needed, a part of the crew would go out and skid a log on to the carriage by hand. This was generally done by the head and tail sawyers and setter, who would then re-

sume their positions and proceed to saw the log, the saw being idle in the meantime while they rolled the log on the carriage, properly placed it upon the head-blocks and firmly set the dogs which held it in place. The carriage frame, 14 feet long and 4 wide, had a platform fastened to and a part of it, upon which the setter stood at an iron lever controlling a mechanism by which he set the log to the saw for each board or piece cut. While the sawing was going on the simple operation of this lever for each cut as signaled by the head sawyer was the sole duty of the setter. There were three iron standards on the south side of the carriage which stood up about three feet high, one near each end and one in the center, in connection with which iron dogs were operated in fastening a log on the carriage. The engineer's position and duties were at the engine in the west end of the building. Erwin Hyne, the head sawyer, stood on a stationary platform some four feet east and a little south of the saw, from where he operated the movements of the carriage back and forth with the lever. A small wheel called the divider was fastened to a roller 8 or 9 inches west of the saw, spreading the board being cut from the log. As the boards were sawed they were looked after by the tail sawyer who stood to the west and south of the saw where there were wooden rollers on a frame some lower than the carriage running to the west end of the building upon which the boards fell from the saw and along which they were moved away by the tail sawyer.

At the time Smith was killed an oak log 12 feet long and 12 or 14 inches in diameter had been placed upon the carriage and was being slabbed. The tail sawyer was just then taking a slab to the west end of the building. While the saw was passing through the log, cutting off a slab, Smith left his position on the platform as setter, got off the carriage at the west

end, went around to the position of the tail sawyer, where he pushed a just released slab which had fallen on the rollers towards the west. The carriage was then starting back to its position for another cut and in attempting to get back to his platform on the carriage which was on the opposite side of the saw from where he then was he fell over upon the saw and was killed. The only eyewitnesses to the accident were the head and tail sawyers.

The negligence complained of by the plaintiff is that the operations were not under a competent and experienced man, sufficient help was not employed, there being no person to carry away the slabs and lumber, and the tail sawyer was required or allowed to leave his station, deceased was not furnished a safe place in which to work, was permitted to cross the path of the carriage to remove slabs "and return to position while the carriage was in motion," and that "the head sawyer should have stopped the carriage when plaintiff's intestate was found to be in the position of the tail sawyer and knew he was about to return to his position on the carriage."

Defendant's principal contention is that his request for a directed verdict should have been granted because plaintiff's evidence does not *prima facie* make out any of the acts of negligence charged in the declaration; that the undisputed testimony shows that the mill was operated in a careful manner by experienced and competent men; and that the evidence conclusively shows that Smith's death resulted from his unanticipated, independent, negligent act in direct violation of instructions, and specific orders, for which defendant was in no manner responsible.

The operation of the mill was in charge of Erwin Hyne, a man 32 years of age, who had charge of fitting it out before it was started up and acted as head sawyer. He was an experienced man, familiar with the

various parts and appliances of the mill, duties of the employees in their various positions, had served as head sawyer eight or ten seasons, and testified: "The mill has never run more than three times in 18 years when I have not been on the job." Charles Standlick, the tail sawyer, testified that he had worked around sawmills quite considerable in other places and from the way Erwin operated the machine he "appeared to understand it and be careful and prudent. He operated it as good as anybody could operate a mill." A witness of defendant named Seymour Kellogg, who testified to over 15 years' experience in operating sawmills, testified he happened to be at the mill that spring the day before the accident, when Smith was the setter, and watched the sawing for perhaps two hours, that they were sawing all the time he was there, that the head sawyer controls the feed and Erwin used a slow speed, saying: "From my observation the first time I was there I would say Erwin appeared to be a competent and safe head sawyer. I know he was." We find no other testimony in this record by any witness touching the competency of Erwin, the man under whom the mill was being operated.

Plaintiff produced three witnesses with experience in sawmills to show the crew was insufficient for proper and safe operation of this mill. Will Palmer-ton, who testified to 30 years' experience in sawmills in various capacities, had seen this mill and thought it should have a crew of five, the shortage as he viewed it being the absence of a "slab rastler" to carry away the slabs, so that the tail sawyer, or "off bearer" as he expressed it, need not leave his position. He also offered the reflection that "in the proper operation of a mill there may be mills that have a thousand men and others that have only one or two." On cross-examination he said:

"There is no reason that I know of why that mill could not have been operated with perfect safety with four men if they had run it slowly enough so that Mr. Standlick could have got the lumber and slab all out of the way. It is simply a question of how fast you operate it. Two men could go out there and run that mill or three men with perfect safety if they run it slow enough."

Ralph Tubbs and Bailey Smith, called by plaintiff as experts, thought there should be one or more slab carriers at this mill because the tail sawyer should remain at his post, as otherwise a slab or other sawed piece might fly or be thrown or caught so as to do damage, a contingency which did not arise in this case. Both conceded that this mill could be run with a crew of four, if operated slow enough, with just as much safety as with more. There was in fact at this mill a fifth employee named Kennedy, caring for the lumber after it reached the west door, who assisted the tail sawyer when needed. Charles Standlick testified of this:

"I was able during that time to do that work and didn't need any assistance in doing it. There wasn't any room for anybody to assist me in there. Of course, as I said before, Mr. Kennedy helped me with some of the big heavy slabs after I got them to the door. There was no necessity for me to have another man out there. There couldn't another man work there with me as tail sawyer. I never saw the mill operated with two men acting as tail sawyers in that kind of a mill."

Defendant's testimony not only showed by men of equal experience that four men for the positions designated was a full crew for this mill as ordinarily run, but it was further shown undisputed that Erwin ran it on slow speed, and that at a later time Kellogg was head sawyer and he ran it with a crew of four men faster than Erwin had done, while Standlick as tail sawyer readily did his work without causing any delays.

The claim that deceased was not furnished a safe place in which to work would seem to be on the theory that the place in which his duties required him to work while the mill was in operation included positions of both setter and tail sawyer, of which there is no proof, while the undisputed evidence is directly to the contrary. His duties were at the log carriage and, when the mill was sawing, his position was upon the platform of the carriage back of the log being sawed, which was between him and the saw. His regular work there was to set the log by the simple mechanism on the carriage—to set it over and adjust it to proper position for each cut before the log started through, or towards, the saw, after which he customarily had no work and no duty but to stand by the log on his platform and watch until the carriage returned to its original position, where it stopped until he made another set as directed by the head sawyer. No element of unsafety is shown in the place furnished him to work beyond those ordinarily appertaining to the duties of a setter in such a mill. An experienced witness of defendant testified that the work of a setter, which was easily and quickly learned, must be done before the carriage is started through the log; that his platform is not dangerous to ride upon if he stands where he belongs and holds the lever, but “danger comes when they begin to shift from place to place and travel around the mill.” The testimony is undisputed that Smith was fully instructed in this particular by Erwin, who cautioned him and emphasized the order with explanation on two or three occasions when he left his position, telling him not to do so any more. Charles Standlick testified: “I heard Erwin say, ‘Mr. Smith, I want you to stay on that carrier.’ * * *

* Erwin said that he wanted him to stay on the platform because it was dangerous for him to go back and forth.” William Standlick, the engineer, testified:

"Erwin told Mr. Smith he wanted him to stay on the carriage. He told all of us to stay at our place."

Of the two men who saw the accident, Charles Standlick was called as a witness for plaintiff and Erwin Hyne for defendant. Standlick stated he thought they had been running the mill about half an hour when it happened. That as he went out at the west end with a slab, Smith was in his position on the carriage which was moving west, and as he returned Smith was in his (the tail sawyer's) place just putting a slab on the rollers which he rolled towards where witness stood. He thought the carriage had started back when he saw Smith "try to grab the carriage" with his left hand; that "he never touched it * * * he stepped on this roller and he slipped and the carriage was going back and the saw cut him right across the hip and took him over the saw." Asked if he meant the roller at the end of the tramway, he answered:

"Yes, and he made a grab for the iron onto the carrier, and he missed that and it threw him right to the saw; he went over the saw, and I hollered—I guess they all heard me—and my brother jumped up on the platform. By the time I got around to where Mr. Smith laid my brother had the engine pretty nearly stopped."

On cross-examination he said:

"I thought from where I stood that as he started to grab for the carriage he stepped on the iron roller, but I could not be positive whether it was the iron roller or a wooden roller. I was about 10 feet from Mr. Smith when he grabbed for the carriage and stepped onto the roller. * * * I wouldn't think he got hold of it with his hand. I think he slipped on that roller and lost his balance, that is as near as I could tell. Then falling forward went onto the saw. As he stepped on the iron roller or some other part of the carrier or machinery there and reached for the carriage I wouldn't think he was two feet from the saw, if he was that. The saw was directly in front of the way he jumped, as he jumped forward. I took

it that the force he had himself given his body by stepping and reaching and the action of the carriage drew him directly onto the saw. That is the way it looked to me. He went so quickly it is pretty hard to tell."

On redirect-examination he further said:

"He started to grab hold of the post with his left hand and went onto the saw back first. I couldn't really tell whether he slipped with the roller over here on the carriage or this iron roller under motion. It was done so quickly, but I thought he was on the iron roller, and he might have been on the wooden roller. I couldn't say. Having in mind the way he turned and the fact his back went against the saw I couldn't tell which one he slipped on."

Of this accident Erwin Hyne testified:

"When Mr. Smith went around to the position of tail sawyer on that day, he got off the west end of the carriage and walked around while the saw was passing through the log, so that at the time it had got through he was around there. He took hold of the slab and as soon as the slab dropped off I started my carriage back. He started with the slab the other way. He moved the slab on these rollers from the east end of the saw where it dropped to the west end of this set of rollers and he was going that way, and the carriage started to go back. He moved this slab on the rollers at least eight feet. He was going that way and the carriage was going this way. I was watching my saw. My saw will rub a little bit on a stick and once in a while a little splinter fly, I was watching out looking right at the saw, and I saw Smith grabbing for the dog on the first head block to the west end and he stepped up on the iron roller. He did not catch the head block. It was too far back that way to the east, but stepped on that iron roller and with his quick motion lost his balance, swung around this way as his foot would throw him naturally over backwards, the saw caught his clothing, he flopped over in the saw as quick as that. The saw traveled around 450 to 500 revolutions a minute. If the saw was running 500 revolutions a minute it was 1/1000 part of a minute he was in passing over that

saw to the other side. The head block and dog which he reached for was near the saw because it was just out of his reach. It cut his clothes in the small of the back and he was whirled over and struck in a sitting position within two feet of me. I had reversed my carriage the minute I saw him making the jump. My carriage was stopped within three feet. A carriage moving with a log is heavy. I don't believe any man could stop one quicker. I stopped it as quickly as I could. At the time he grabbed for this standard on this carriage the east end of the carriage was about 14 feet east of the saw because the first head block was at the west side of the saw, or a little bit beyond, but it was just out of his reach. * * * The last time that I saw him before that he was pushing the slab on these rollers."

The undisputed testimony shows that Smith had, in violation of orders and while the head sawyer was occupied in controlling the returning carriage preparatory for another cut from the log, left his station and the appliance to which his duties related, passing by a safe way around the saw to a place and for a purpose out of the range and line of his employment; that when the cut was finished and the carriage started east to return past the saw for another cut he had started the other way (to the west) with the slab which had just been cut. He was then in a safe place going away from the saw. His next duty in the line of his employment was to make a set for the next cut, after the carriage had cleared the log 12 feet long, to the east of the saw and stopped. It would have taken him but the fraction of a minute to have walked that distance, and the first indication of his intent to do otherwise was his unsuccessful attempt to catch hold of the west standard, or dog of the head block on the carriage approaching the saw, on the opposite side from him for the indicated purpose of resuming his position on the carriage at the further side of the log which was also on the further side of the saw from him. In this attempt he stepped on a roller, which

he knew was there, lost his balance and fell against the saw with the sad result related. Standlick, plaintiff's witness, estimated that he was less than two feet from the saw directly in front of him when he stepped on the roller, reaching for the carriage, and lost his balance. Hyne said the iron roller was nine inches from the saw and estimated that "he must have been within two feet of the saw when he reached."

The case was submitted to the jury, which rendered a verdict for plaintiff in the sum of \$1,990. The court charged the jury upon the circumstances of the accident as follows:

"And if you should find in this case that plaintiff's intestate was instructed to remain, by defendant's agents, in his place of duty on the platform attached to the carrier, being the setter's place of duty as appears from the evidence, and you should further find that he left that place and went to the place of tail sawyer, and while at the place of tail sawyer, in attempting to return to his place of duty while two feet from the saw he placed his foot upon an iron roller nine inches from the saw which he was facing, and tried to climb on the carrier then in motion and over a log thereon, he would as a matter of law, be guilty of wilful negligence, and should you find from the evidence that he did not follow his instructions to remain at his place of duty and did all of these other things I have mentioned at the time and place in question, and you should further find that such actions and conduct on the part of plaintiff's intestate was the cause of his death, then your verdict should be no cause of action."

If this instruction is a correct statement of the law in the case a verdict should have been directed for defendant as the record discloses all the contingent facts stated in the instruction established by undisputed testimony, not only that produced by defendant but in most particulars by the testimony of plaintiff's witness, Charles Standlick.

Defendant not having elected to come under the

workmen's compensation act, the common law defenses of assumption of risk, negligence of a fellow-servant and negligence of the injured employee, "unless and except it should appear such negligence was wilful," were not available to him (2 Comp. Laws 1915, § 5423). The trial court in submitting the question of wilful negligence instructed the jury as to such defense that the burden of proof was upon defendant to show Smith was guilty of willful negligence, and later, that if defendant or his employees were guilty of any of the acts of negligence charged in plaintiff's declaration which caused or contributed to the accident the latter was entitled to recover "even though you also find that the deceased himself failed to exercise due care."

Defendant contends with some force that the last instruction as given without qualification, and later in the charge than the instruction as to willful negligence, entirely eliminated that defense, as to which the court also erroneously put the burden of proof upon the defense against the settled rule of evidence in this State that in common-law, *ex delictu*, sections it is incumbent on the plaintiff to prove freedom from negligence, of any degree, causing or contributing to the accident, which is not changed by the law excusing him from all negligence not willful.

But back of those, and other questions argued, is the basic proposition that the kind or degree of the employee's negligence is of little moment in the absence of evidence of negligence on the part of defendant, as pointed out in *Lydman v. DeHaas*, 185 Mich. 128. In that important particular we are of the opinion plaintiff has failed to sustain the charges of negligence found in his declaration. The essential facts are practically undisputed. Amongst other evidence urged as raising an issue of fact for the jury, is that defendant's negligence is shown by the testimony of Palmerton, Tubbs, and Smith, who testified that in

their opinion proper and prudent operation of a saw-mill required the head sawyer to stop his carriage until the setter had returned to his place of duty or reached a place of safety. Smith was certainly in a place of perfect safety and not needed at his place of duty until the carriage was back east of the saw and stopped for a re-set of the log. He was headed and moving away from the saw when the head sawyer started the carriage back for a short distance to where it would stop; there was nothing to suggest the possibility of Smith's putting himself in a place of danger. These witnesses, and all other mill men who testified in the case, said that in their experience they never knew any person in a mill to attempt to catch a carriage moving towards the saw, and cross over it to the setter's position. Asked if he ever saw such a thing Palmerton said, "No," and that in his judgment no sensible man would take the chance. Tubbs said, "I never saw any one attempt to do that in 35 years. A man attempting to do that would take great chances." Smith said he had never seen it done while the saw was in motion, and he did not "think any prudent man would attempt such a feat." In view of such unanimous testimony by men of long experience it cannot be said under the circumstances shown in this case that it was negligence for the head sawyer not to anticipate it.

As was said by Justice MOORE in *Munn v. Telephone Co.*, 206 Mich. 201: The testimony "does not disclose actionable negligence on the part of defendant, but it does disclose an accident that nobody could or did anticipate." A verdict should have been directed for defendant.

The case is reversed without a new trial, with costs to defendant.

BIRD, C. J., and SHARPE, MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

PARK BUILDING CO. v. GEORGE P. YOST FUR CO.

1. LANDLORD AND TENANT—LEASE—CONSTRUCTION.

Where a lease is susceptible of more than one construction, that most favorable to the lessee must prevail.¹

2. PROPERTY—PAST-DUE RENT PERSONALTY.

Rent past due, *held*, to be personal property.

3. CONTRACTS—CONSTRUCTION—GENERAL WORDS AFTER SPECIFIC.

Where no intention to the contrary appears, general words used after specific terms are to be confined to things *ejusdem generis* with the things previously specified.

4. TAXATION—FEDERAL INCOME TAX UPON RENTALS NOT A TAX UPON THE PROPERTY.

Lessor's income tax, as applied to leased property, *held*, not a tax "levied upon said premises," but in its process and assessment a direct personal tax against him.

5. LANDLORD AND TENANT—LEASE—TENANT'S COVENANT TO PAY TAXES DOES NOT INCLUDE LESSOR'S INCOME TAX.

A lease providing that the lessee should pay all taxes of every nature and kind whatsoever, levied upon said premises, specifying the same in apt and appropriate terms, and further providing that it was the intent to insure to lessor a net rental, but containing no reference whatever to lessor's Federal income tax, construed, and *held*, not to be the intent of the parties that the lessee should pay the lessor's Federal income tax based upon said rental.

Error to Wayne; Tappan (Harvey), J., presiding. Submitted October 16, 1919. (Docket No. 61.) Decided December 22, 1919.

Assumpsit in justice's court by the Park Building Company against the George P. Yost Fur Company for the amount of a Federal income tax paid upon rentals received from defendant. There was judgment for defendant, and plaintiff appealed to the cir-

¹On construction and effect of covenants in lease, sublease, or assignment of lease as to payment of taxes and assessments, see note in L. R. A. 1915A, 334.

cuit court. Judgment for defendant. Plaintiff brings error. Affirmed.

Stellwagen, MacKay & Wade, for appellant.

Clark, Emmons, Bryant & Klein, for appellee.

STEERE, J. The facts in this case are undisputed and stipulated. The Park Building Company is, and was for some time before commencement of this action, owner of lot 14 and the north 20 feet of lot 13, section 8, Governor & Judges' plan of the city of Detroit, and had leased said premises to Edward C. Van Husan for a term of 99 years. It was organized as a corporation for the sole purpose of owning and leasing this property and had no other assets or source of income except the rentals therefrom. On the 23d of February, 1916, Van Husan sub-leased the premises to defendant George P. Yost Fur Company for a term of 91 years and 8 months, beginning April 1, 1916, and Van Husan assigned his sub-lease from defendant to the Park Building Company.

The United States government assessed for the year 1916 an income tax against the Park Building Co. upon the income derived from the annual rental paid to it by the defendant lessee of said property, which was paid. But three-fourths of this income tax, amounting to \$99.31, is directly involved here as the lease had been in effect but three-quarters of that year, but succeeding annual assessments are necessarily indirectly involved. The case was commenced in justice's court to recover the amount of income tax paid by plaintiff and claimed due from defendant under the lease for 1916, whence it was carried to the circuit court of Wayne county by appeal, and plaintiff now appeals from an adverse decision against it in the circuit court.

The sub-lease of February 23, 1916, from Van Hu-

san to defendant and assigned by him to plaintiff, is the instrument under consideration. The question involved is whether said lease contemplates, and by fair construction of its provision requires defendant shall pay such Federal income taxes as may be assessed against its landlord upon the rentals received from it thereunder. The lease provides for a monthly rental of \$1,750 for a portion of its duration and an annual rental thereafter of \$25,800 for the remaining 82 years of the term, at all times payable in advance on the first day of each month in equal monthly installments. It is an elaborate, carefully drawn instrument, with numerous provisions which need not be detailed, that relating to taxes being the one directly involved which is as follows:

"Taxes: As a further consideration for the leasing and demising aforesaid, the said party of the second part further covenants, promises and agrees to bear, pay and discharge, in addition to said rent reserved, all rates, taxes, charges for revenue and otherwise, assessments and levies, general and special, ordinary and extraordinary of every name, nature and kind whatsoever, including water rates, which may be taxed, charged, assessed, levied or imposed upon said premises, and upon any and all buildings and improvements thereon and any personal tax levied or assessed upon said party of the first part, which may be assessed, levied or imposed upon the leasehold estate hereby created and upon the reversionary estate in said premises during the term hereby granted and so long thereafter as said party of the second part, its successors, representatives and assigns, shall occupy said demised premises; the intent hereof being to insure to said party of the first part a net rental hereunder, not chargeable with any burdens by way of taxes, or otherwise, resulting in the diminution of the same.

"And it is further understood, covenanted and agreed by and between the parties hereto, that the said party of the second part shall pay, on execution of this lease, its *pro rata* share of the city taxes for

1915-1916, and also the State and county taxes for 1915-1916, which may be levied upon said premises. And the party of the second part further covenants and agrees to obtain and deliver to the said party of the first part within thirty (30) days after such taxes shall respectively become due and payable, duplicate tax receipts of all taxes and assessments paid on said premises of every kind and nature whatsoever; and all such taxes and all such receipts shall be paid and made out in the name of the said party of the first part, or his heirs or assigns; and that the said duplicate tax receipts shall be promptly sent by mail to said party of the first part or to such agent or depository as he may designate in writing."

The lease contains a further provision that the party of the first part may at any time during the term of said lease pay any due and unpaid taxes, assessments, water rates or other charges "upon said premises," such payments to be a claim against the lessee as additional rent. Upon construction of the above-quoted sections relative to payment of taxes, plaintiff particularly stresses the provision that the intent is "to insure to said party of the first part a net rental hereunder, not chargeable with any burdens by way of taxes, or otherwise, resulting in the diminution of the same," and urges that in comprehensive explanation of what immediately precedes and follows, this general statement makes plain by fair construction of the tax clause taken in its entirety that the contracting parties to this lease contemplated and agreed the lessee should during the life of the lease pay all income taxes which might be assessed against the lessor on account of rentals received.

It is the contention of defendant that where more than one construction is possible that most favorable to the lessee should prevail, and by fair construction the generalizing words in the tax clause are but explanatory of and confined to such taxes and charges as relate to and may be directly imposed upon the

preceding named estates, free of which the rental shall be net; and does not contemplate by fair intendment any personal income tax which may be imposed upon the lessor after he has received the stipulated net rental from the lessee, free of all taxes, rates, charges, etc., which are assessed, levied or imposed as a burden on the leased premises themselves.

Pertinent to that inquiry it may be noted that at the time the lease was entered into there was a Federal statute providing for an income tax, though not the same as now in force. The lease nowhere makes any direct reference to a personal income tax. The tax section in detail and with apt phraseology takes cognizance of and requires that the lessee shall pay all taxes upon four estates in the property, directly named as follows: "said premises"—"all buildings and improvements thereon"—"the leasehold estate hereby created"—and "the reversionary estate in said premises during the term hereby granted," and the lessor with detailed effort to make certain from the beginning prompt payment by the lessee of the taxes so specified, provided in the second paragraph of the tax clause that the second party should forthwith pay its *pro rata* share, for the balance of that tax year, of the city taxes, and the State and county taxes for 1915-1916, "which may be levied upon said premises." And within 30 days after said taxes become due obtain and deliver to said first party duplicate tax receipts "of all taxes and assessments paid on said premises of every kind and nature," to be paid and made out in the name of the first party, his heirs or assigns, with no suggestion indicating an intent that the tenant should pay any portion of the personal income tax which might be assessed or levied against the lessor for 1916 or later.

In their briefs counsel for the respective parties

agree that upon the precise issue presented no decisions of any Federal court or of this court are to be found directly in point, and but few cases can be found in other States where leases have been so worded as to give rise to litigation over whether the lessee is obligated to pay the lessor's income tax upon the rent which he receives. Counsel cite and discuss at some length three decisions of the Massachusetts supreme court where the question has arisen over the wording of lease covenants of questioned phraseology, none of which are identical with each other or the case at bar, but are urged as more or less analogous and illuminating.

In *Suter v. Jordan Marsh Co.*, 225 Mass. 34 (113 N. E. 580), decided September, 1916, the court had under consideration a covenant in a lease by which the lessee agreed to pay "all taxes and assessments whatsoever, except betterment taxes, which may be levied for or in respect of the leased premises, or any part thereof, or upon or in respect of the rent payable hereunder by the lessee, howsoever and to whomsoever assessed." The court held that such covenant required the lessee to pay a United States income tax imposed upon the rent against the lessor, saying:

"The only payment which the United States had a right to exact under the law was a tax at a specified percentage upon the rent reserved for a stated period of time. That exaction is called in the act of congress a 'tax.' It is in its nature a tax. But by the terms of the lease, defendant has obligated itself to pay 'all taxes and assessments * * * upon or in respect of the rent * * * howsoever and to whomsoever assessed.'"

In *Codman v. American Piano Co.*, 229 Mass. 285 (118 N. E. 344), decided January 14, 1918, that court had before it for consideration a lease containing the following:

"And the lessee further covenants and agrees with the lessor to pay punctually within fourteen (14) days from the times when they become due and payable all taxes and assessments whatsoever which may be payable for or in respect of the leased premises during the term thereof, except assessments for betterments hereinafter arranged for."

Pointing out the distinction that in the *Suter Case* the covenant not only expressly required the lessee to pay the taxes upon the leased premises but also upon or in respect to the rent payable under the lease, the court in an interesting discussion of the subject said in part:

"In other words, the agreement of the parties as expressed in the lease is to govern and control their respective rights in view of the language employed. * * * The legal signification (of the covenant last quoted) clearly is that the taxes are those which relate solely to the premises themselves and not to the rent reserved which, when due, is a separate and independent estate. * * * The words used by the parties cannot fairly be extended by us beyond their natural and ordinary meaning, and therefore the defendant cannot be held liable for taxes which the covenant neither by express words nor reasonable implication obliged him to pay."

In *Kimball v. Cotting*, 229 Mass. 541 (118 N. E. 866), decided February 28, 1918, the question again arose over the covenant in a lease providing:

"The lessees covenant and agree to pay and discharge any taxes or excises which during the term may on any assessment day be lawfully levied or assessed to either the lessors or the lessees upon or against the rent payable hereunder for or in respect of the period between such assessment day and the last prior assessment day, or for or in respect of the period between the first of such assessment days and one calendar year prior thereto, whether levied or assessed upon the same as rental or income, but not for any other taxes or excises in respect thereof."

Analyzing this covenant the court points out that it relates exclusively to the payment of taxes levied upon the rent reserved by the lease whether levied against the lessors or the lessees, making no difference within the scope of the covenant whether the burden is imposed by law upon the one or the other. Referring to the expression "any assessment day," the court notes it as manifest from the words following in the covenant that it was the intent of the parties to impose the obligation upon the lessees whether the tax was levied as a property or an income tax, and it being provided by express words that the lessees should be liable for the tax levied upon the rent "whether as rental or as income," finds it clearly the intent of the parties that the words "assessment day" did not refer immutably to a single date "but were designed to include whatever period, not exceeding that elapsing between two successive assessment days, might be established by any tax law thereafter enacted as the measurement of the income." And concludes that there being no express limitation to the one or the other by words of the covenant it was plainly the intent of the parties to include both State and Federal taxes. Referring to the two preceding cases upon the subject the court said that the instant case though not governed by the *Suter Case* was of similar import, but readily distinguishable from the *Codman Case*.

It is scarcely necessary to note that back of the question of interpretation or construction of the disputed tax clause in the lease no restraining Federal or State laws are involved. While as between the government and the lessor he alone was held accountable for and obliged to pay his income tax from whatever source derived, as between themselves the contracting parties were at liberty to agree as positively and in as direct terms as they saw fit to adopt that the

lessee should pay all or any particular part of the Federal income tax of the lessor, his heirs or assigns, throughout the generations it was provided this lease should run. If that was what the contracting parties had in mind and agreed it must be conceded, as defendant contends, that the phraseology adopted was not the most appropriate vehicle of thought to express such agreement, which by a few simple and direct words could have been made plain and certain beyond any peradventure. But aside from that reflection and however unhappy the wording for the purpose, the inquiry here is whether by reasonable construction such is its legal import, fairly disclosing that the minds of the parties met upon that proposition.

It is undisputed that the question involved turns on construction of the concluding sentence in the first paragraph of the tax clause, relative to net rental. Deferring to the combined contentions of counsel for the respective parties it would seem to be susceptible of more than one construction, which, however, each is inclined to deny. Clearly it does not impose upon the lessee in any direct language payment of all taxes levied upon or *in respect to the rent* howsoever or to whomsoever assessed, as in the *Suter Case*, nor those levied and assessed *upon rent payable*, whether as rental or *income*, as in the *Kimball Case*. Neither does it in like direct and express terms confine the lessee's burden to taxes payable for or in respect of *the leased premises*, as in the *Codman Case*. Defendant contends such is the manifest meaning of the tax clause as a whole and it should be so construed, while plaintiff argues to the contrary.

We do not think it can be said with certainty that the meaning of the language in controversy is absolutely without ambiguity or the intent so aptly expressed as to be beyond doubt and forbid construction. It is a recognized rule of construction that where more

than one meaning is permissible that most favorable to the lessee must prevail; *Pere Marquette R. Co. v. Wabash R. Co.*, 141 Mich. 215. Rent past due has been held to be personal property; *Burden v. Thayer*, 3 Metc. (Mass.) 76, and certainly is such after paid to the lessor. Under the lease in question it was payable monthly in advance. Nowhere in the lease is any mention made, by name or synonym, of any income or other personal tax to be paid by either party. The income tax imposed on the landlord is not computed or assessed against him until the end of each year, upon the actual income he received during that year. The stipulated rent for that year, payable monthly in advance by the terms of the lease, would have all reached his hands and become his money, a then net rental to him free from all taxes and charges assessed or levied against the premises leased. What plaintiff proposes and contends for is to include by construction of the general provision under consideration a subject not included in it by name or directly indicating expression.

Were those words unqualified by anything in the lease which preceded or followed them the omnibus language used might more readily yield to plaintiff's interpretation. But it is a long settled rule of construction, which had become a legal maxim even before the days of Broom, that words of specification draw into the same class any general terms or words presumably super-added to attain the end without further prolixity. In this tax clause the conveyancer was liberally prolix in details and words of specification relative to the kinds of taxes the lessee must pay and upon what imposed, immediately preceding the general terms with which the last sentence in the paragraph concluded; and in a second paragraph, as it were an afterthought, the subject is again treated in added detail with words of specification further defin-

ing the lessee's obligations to pay taxes "upon said premises." This rule, though perhaps most frequently found in cases involving construction of statutes, is of general application. In *Brooks v. Cook*, 44 Mich. 617, Justice COOLEY thus defines it:

"But it is a sensible and well understood rule of construction that when after an enumeration, the statute employs some general term to embrace other cases, the other cases must be understood to be cases of the same general character, sort or kind with those named."

The case of *Hawkins v. Railroad Co.*, 17 Mich. 57, which involved the construction of a contract, is there cited. Justice CAMPBELL, writing the opinion in the *Hawkins Case*, said:

"The rule is usually applicable, that where no intention to the contrary appears, general words used after specific terms are to be confined to things *ejusdem generis* with the things previously specified."

Counsel for plaintiff contend the intention of the parties that the concluding words of the paragraph should not be qualified by what went before, and they should be regarded as "a new, separate and distinct idea," is made evident by the fact that a semicolon is inserted between what precedes and the general concluding clause. While not prepared to discuss the subtle principles of punctuation to any degree of nicety, we note it stated in the Century dictionary that the semicolon, mentioned as "a Latin delicacy which the obtuse English typographer resisted," is a punctuation point "used to mark the division of a sentence somewhat more independent than that marked by a comma," and it may be stated as a matter of common knowledge that the full stop or end of a completed sentence is marked in printing or writing by a period. Whatever distinction there may be between a comma and a semicolon, it remains that the concluding words

in question are a part of the lengthy specifying sentence preceding them.

Plaintiff further contends that even if we accept the narrow and strained construction defendant urges, limiting the general language to meaning rentals should not be diminished by any kind of tax assessed upon the premises, nevertheless a tax upon rent payable is a direct tax, and in effect a tax upon the premises from which the rent is derived; and if, as must be conceded, the lessee is holden for all taxes on the leased premises he is necessarily required to pay the income tax on the rent payable. In support of this proposition counsel cite and argue from the somewhat celebrated case of *Pollock v. Trust Co.*, 157 U. S. 429 (15 Sup. Ct. Rep. 673), reported on rehearing in 158 U. S. 601 (15 Sup. Ct. Rep. 912), in which the Federal income tax of 1894 was held unconstitutional by a bare majority of the court. The reported case with its rehearing, consisting of some 340 printed pages, is an extremely interesting and instructive promulgation of legal thought, learning and debate, in which however the justices who sat in the case were scarcely more successful in agreeing among themselves than were the attorneys who argued it. It is there said in the majority opinion:

"An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income."

This was said in a lengthy discussion of whether an income tax on rentals was a direct tax within the meaning of the Federal Constitution and therefore invalid because not levied in accordance with the constitutional rule of apportionment. On the rehearing it was said of this holding:

"The question thus limited was whether such taxation was direct or not, in the meaning of the Consti-

tution, * * * that a tax upon the realty and a tax upon the receipts therefrom were alike direct."

We are not impressed that these views, limited in application to the constitutionality of the income tax apportionment, are of controlling significance here. The court was only considering the distinction between direct and indirect taxes in its relation to the case decided without reference to its bearing upon, or application to, other and different cases. Whether direct or indirect, the lessor's income tax as applied to this leased property is not a tax "levied upon said premises," or on any of the four estates named in the lease, but is in its process of levy and assessment a direct personal tax against him, inseparable from him and his annual income, beginning and ending with him. The *Pollock Case* was cited and unsuccessfully insisted upon as controlling in the *Codman Case*. The court there aptly offered the postulate that:

"In construing the covenant it is plain that taxation upon real estate means one thing, and taxation upon income means another."

Without extending this opinion to further review that case, it may be said we regard its discussion of the question persuasive and well in point here.

The tone and tenor of this contract throughout is directed with careful description to the leased premises, the taxes thereon and rental therefor which the lessee must pay during the long life of the lease extending into succeeding generations. To that end and extent the intent of the parties is made plain to a certainty by clear expression with appropriate names and descriptive terms, which by recognized rule of construction limit general words and terms super-added to the same general character or kind as the things previously specified. They contain no suggestion that in addition to all taxes on the premises and

nominated rent the lessee must also pay his landlord's personal income tax, a matter of greater moment and easier description than certain of the requirements clearly and distinctly specified. It is not an unreasonable presumption that had the contracting parties had in mind, agreed upon, or intended to impose payment of the landlord's income tax on the lessee, they would have expressed the intent in equally clear and positive language with appropriate descriptive terms, which they could readily have done without multiplying words.

In the reflected light of the matters dealt with in detail with descriptive terms and the context surrounding the generalizing language under consideration, we are constrained to agree with the following conclusion of the trial court:

"In addition to the foregoing, it is also my conclusion that it cannot be held that the minds of the contracting parties met upon the proposition that the lessee should pay the landlord's income tax."

The judgment is affirmed.

BIRD, C. J., and SHARPE, MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

OSCAR DANIELS CO. v. CITY OF SAULT STE. MARIE.

1. APPEAL AND ERROR—EXCEPTIONS—NECESSITY—REVIEW.

Where, in a case tried before the court without a jury, there was no request for special findings, no findings made, and no exceptions taken, under Circuit Court Rule No. 45 there is nothing for the Supreme Court to review.

2. SAME—EVIDENCE—SUFFICIENCY—EXCEPTIONS—REVIEW.

Where no exceptions are taken to any of the findings, and it is not assigned as error, or contended, that the facts found do not support the conclusions of law, assignments of error in the admission and rejection of testimony and the sufficiency of the evidence to support particular findings cannot be reviewed.

3. SAME—STIPULATED FACTS PRESENTING QUESTION OF LAW—REVIEW.

Although the practice in conformity with Circuit Court Rule No. 45 was not followed, where the stipulated facts present a single principal question of law, the Supreme Court may consider the contention made in substance and effect in the assignments of error and argued in the briefs, whether they support the conclusion of law—the judgment.

4. STATES—JURISDICTION OF STATE OVER CEDED TERRITORY—STATUTES.

The jurisdiction over the St. Mary's Falls ship canal ceded to the United States by the State of Michigan in Act No. 17, Pub. Acts 1881, construed, and *held*, to be less than exclusive; the purpose being to confer upon the United States exclusive power to control the canal, and any buildings and works connected therewith for the purposes of operation.

5. SAME—TAXATION OF PRIVATE PERSONALTY ON CEDED TERRITORY—VALIDITY.

The jurisdiction ceded by said act being less than exclusive, and the ceded territory not being out of the State so far as the operation of its tax laws are concerned, a tax levied upon private personal property thereon within the limits of the city of Sault Ste. Marie, by said city, although employed in contract construction work for the United States government, *held*, valid.

Error to Chippewa; Fead (Louis H.), J. Submitted April 24, 1919. (Docket No. 107.) Decided December 23, 1919.

Assumpsit by the Oscar Daniels Company against the city of Sault Ste. Marie for taxes paid under protest. Judgment for plaintiff. Defendant brings error. Reversed.

H. W. Runnels and *F. T. McDonald*, for appellant.
Davidson & Hudson, for appellee.

This cause was tried by the court without a jury and resulted in a judgment for the plaintiff. No findings were requested or were made. No exceptions were taken to the conclusions arrived at by the court. No points of law were presented by either party as upon requests to charge in jury trials. Circuit Court Rule No. 45. There was a stipulation of facts, upon the offer of which plaintiff rested. Defendant proceeded then to introduce certain testimony not contradicting the facts embraced in the stipulation and not apparently used by the court in reaching a conclusion. Defendant raises the questions argued by assignments of error which, in substance and effect, say that the facts do not support the judgment. The stipulation of facts is:

"The facts in the above entitled cause being largely matters of record in the office of the United States engineer at Sault Ste. Marie and the office of the city treasurer at Sault Ste. Marie, Michigan, all being readily susceptible of proof and there being no material dispute between the respective parties hereto as to those facts, the same are stipulated and agreed between the respective parties hereto, as follows, to wit:

"1. That the plaintiff is an Illinois corporation, having its office and principal place of business in the city of Chicago, county of Cook, Illinois.

"2. That the plaintiff is engaged in the contracting business for profit and gain and during the years 1916

and 1917 was engaged in the excavation for and construction of a lock to be known as the Fourth Lock at the Falls of St. Mary's river under and by virtue of a contract entered into by said plaintiff with the United States government for profit and gain.

"3. That for the purpose of the said excavating and construction work the plaintiff brought to the place of operation certain steam shovels, locomotives, cars and other equipment, lumber, cement, trap rock and other material, and erected certain warehouses, tracks and temporary buildings, all of which have been used solely in connection with the erection of the Fourth Lock at Sault Ste. Marie, Michigan.

"4. That the said personal property was of the value of \$35,000.00 or thereabouts and it has been used and kept only upon land ceded by the State of Michigan to the United States government by Act No. 17 of Public Acts of Michigan, session of 1881.

"5. That the city of Sault Ste. Marie has assessed, levied and attempted to collect State, county and municipal taxes upon the within named personal property of the Oscar Daniels Company property for the years 1916 and 1917, which the plaintiff has refused to pay until compelled to do so.

"6. That on December 1, 1916, the treasurer of the defendant, the city of Sault Ste. Marie, made its usual demand for payment of personal taxes for the year 1916, informing the plaintiff as follows:

" 'The above tax is now due and payable on or before January 9th, 1917.' "

"And thereafter on May 11th, 1917, made another similar demand upon the plaintiff for the personal taxes for 1916 with the accrued interest added thereto.

"7. That in December, 1917, the treasurer of the defendant, the city of Sault Ste. Marie, made a similar demand upon the plaintiff for the taxes of 1917; both these demands were ignored by the plaintiff who neglected to pay its taxes for the respective years of 1916 and 1917, and said plaintiff did not pay its taxes until April 30th, 1918.

"8. On February 15th, the defendant, by Herbert W. Runnels, Esq., its city attorney, made a demand upon the plaintiff for the taxes of 1916 and 1917 and

threatened seizure unless the taxes were paid within ten days following the letter, a copy of which being hereto attached and marked Exhibit 'A,' and at about that time the city attorney conferred with the attorneys for the plaintiff, advising them that unless the taxes were paid he was directed by the city commission to enforce the collection by seizure of the personal property and he was informed by the plaintiff, through its attorneys, that the company would only pay upon compulsion.

"9. On March 26th, the plaintiff was formally notified by the defendant, through its city attorney, that a levy and seizure of the personal property of the plaintiff would be made on the 30th of March, A. D. 1918, a copy of which letter being hereto attached and marked Exhibit 'B.'

"10. That on April 20th, 1918, the defendant, by George S. Wescott, its treasurer, made a formal demand for payment of taxes as follows:

For 1916	\$947.37
For 1917	874.81

"And upon said demand the plaintiff still refused to pay the taxes.

"11. That after demand and refusal on, to wit, the 22d day of April, the city treasurer levied upon the personal property of plaintiff for the purpose of sale of same, duly posted proper notice that the same would be sold on public sale at the time and place specified in said notice.

"12. That on April 30th, 1918, the plaintiff paid to the defendant at the office of its city treasurer the sum of \$947.37 for the taxes for the year 1916, and

"The sum of \$874.81 for the taxes for the year 1917, receiving a receipt therefor, a copy of which is hereto attached and marked Exhibit 'C,' this payment being made under protest in writing, said protest specifying the reasons for the several refusals on the part of the plaintiff to pay said taxes, copy of which protest is hereto attached and marked Exhibit 'D.'

"13. That all the facts applying to either of the years for which taxes were assessed as set forth in this stipulation apply to the other year and the action for the recovery of each of the several years is con-

solidated into one action by previous agreement between counsel, for the purpose of avoiding multiplicity of litigation.

"14. That the city of Sault Ste. Marie is a regularly organized municipal corporation being organized under and by virtue of the laws of the State of Michigan, and that the officers assessing the taxes for the respective years, 1916 and 1917, were regularly and duly elected officers of the city of Sault Ste. Marie, and were properly engaged in the duties of their respective offices.

"15. That the geographical limits of the State of Michigan, as set forth in the Constitution, extend north and west in St. Mary's river along the boundary line between the United States and Canada to a point where said boundary line last touches Lake Superior and includes within its limits the land upon which the plaintiff's personal property was situated at the time of the seizure.

"16. That the geographical limits of the village of Sault Ste. Marie as set forth in the charter of the village of Sault Ste. Marie as incorporated in 1879 and of the city of Sault Ste. Marie as incorporated in 1887, and in chapter 1, section 1 of the city charter, as adopted June 26th, 1917, extend north and west along the international boundary line between the United States and Canada and includes within its limits the land upon which the plaintiff's personal property was situated at the time of its assessment and also at the time of its seizure.

"17. That at the time of the assessment of the taxes for the years 1916 and 1917, in this stipulation set forth, there was property of the plaintiff engaged in the excavating for and construction of the Fourth Lock, and not otherwise, and upon the land ceded as set forth in paragraph 4 herein, sufficient to justify the levy of said taxes at the time of the assessment, to wit, the second Monday in April of each of the years 1916 and 1917.

"18. That the assessment, review, apportionment and all the various steps taken in levying taxes within the city of Sault Ste. Marie for the years 1916 and 1917 were regular and in conformity with the statutes of the State of Michigan and the charter of the city of

Sault Ste. Marie; that the only question in dispute relative to the proceedings in the tax against the plaintiff for the years 1916 and 1917 in the above entitled cause is the right or jurisdiction of the city of Sault Ste. Marie to assess for taxation personal property of the said Oscar Daniels Company, located within the limits of the territory ceded by the State of Michigan to the United States by Act No. 17 of the Public Acts of 1881.

"19. That the said tax was assessed for and apportioned to the several State, county, and municipal funds, as follows: 1917—State tax, \$66.77; county tax, \$174.58; city tax, \$245.00; school tax, \$231.00; one mill school tax, \$35.00; county road tax, \$72.94.

"1916—State tax, \$55.75; county tax, \$142.00; city tax, \$310.00; school tax, \$272.95; one mill tax, \$25.00; county road tax, \$40.50; that to the above taxes was added as provided for in the statutes of the State of Michigan and the charter of the city of Sault Ste. Marie, a collection fee of 4 per cent. and interest at the rate of 1 per cent per month from March 1st, 1917, in case of the 1916 tax, and from March 1st, 1918, in the matter of the 1917 tax."

The protest accompanying the payment of the said taxes reads as follows:

"To the Mayor and Commissioners of
Sault Ste. Marie, Michigan.

"To George S. Wescott, Treasurer of
Sault Ste. Marie, Michigan.

"The certain personal property of the Oscar Daniels Company has been seized for the taxes of 1916 and 1917 in the following amounts:

1916.....	\$947.73	1917.....	\$874.81
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"Having made a seizure, which he claims is under and by virtue of section 1815 of chapter 28 of Howell's Annotated Statutes, second edition [1 Comp. Laws 1915, § 4043], and having posted certain notices of sale of said personal property preparatory to making sale thereof under the statute.

"The city treasurer threatens to sell said personal property in an amount sufficient to satisfy the said taxes for 1916 and 1917, to wit: the sum of \$1,822.54 together with necessary expense and legal charges therefor.

"In order to avoid the sale of said property of the Oscar Daniels Company and in order to protect said property from seizure and sale by the city treasurer, the said Oscar Daniels Company hereby presents the sum of \$947.74 in payment of the taxes of 1916 and the sum of \$874.81 in payment of the taxes for 1917, it being understood, however, that such tender and payment is made under protest and the Oscar Daniels Company hereby protests against the assessment, levy, seizure and threatened sale of said personal property for the following reasons, to wit:

"1. That the said Oscar Daniels Company is not a citizen or resident of Sault Ste. Marie, Chippewa county, Michigan.

"2. That the property upon which said assessment was levied was not at the time of the respective assessments of 1916 and 1917 within the city of Sault Ste. Marie, Michigan, nor within the jurisdiction of the city of Sault Ste. Marie, Michigan, nor within the jurisdiction of the State of Michigan for the purpose of the assessment of said taxes.

"3. For the further reason that the Oscar Daniels Company is and was at the time of the assessment of said taxes against its personal property a contractor engaged in the construction of the Fourth Lock for the United States government and said personal property of the Oscar Daniels Company was in use in the construction and erection of the said Fourth Lock being erected by the Oscar Daniels Company as contractor for the United States Government, and said personal property was situated on lands and territory ceded to the United States by the State of Michigan under and by virtue of Act No. 17 of Public Acts of 1881, and that while said property was within what is loosely termed as the geographical limits of the State of Michigan, it was nevertheless upon the property ceded by the State to the Federal government for the erection of the locks and other Federal eventualities.

"4. For the further reason that neither the city of Sault Ste. Marie nor the county of Chippewa, nor the State of Michigan, have any right to assess taxes upon the property of a contractor so engaged in the erection of locks or other government instrumentalities

upon the territory ceded by the State of Michigan to the United States government under and by virtue of Act No. 17 of Public Acts of 1881. For that reason the assessment of said taxes by the city assessor and by the city of Sault Ste. Marie, the levy and collection is illegal, said personal property being beyond the jurisdiction of the assessing officers of the city of Sault Ste. Marie for any purposes whatever.

"5. For the further reason that the said property is not and never has been within the jurisdiction of the city of Sault Ste. Marie, the county of Chippewa, or State of Michigan."

It was also admitted that the plaintiff had not been admitted to do business in Michigan.

Upon the principal point in dispute, the court in the opinion said:

"This is a suit brought by plaintiff to recover taxes paid by it to defendant under protest. The facts are practically all stipulated. The principal question is whether the property of the plaintiff was subject to taxation in the city of Sault Ste. Marie, it being located upon and used in the construction of the Fourth Lock of the government canal, jurisdiction over which was ceded by the State to the Federal government by Act No. 17, Public Acts of 1881.

"The taxing power of the State is limited to persons and property within and subject to its jurisdiction. The State cannot tax tangible personal property unless (1) the party taxed is a resident of the State or (2) the property taxed has an actual *situs* within the State. 37 Cyc. p. 718.

"The plaintiff is a foreign corporation and a non-resident of the State, except so far as its location in constructing such lock may change the situation. The proposition of whether the property taxed has a *situs* within the State depends upon the effect of Act No. 17, Public Acts 1881.

"Jurisdiction over property within a State may be acquired by the Federal government in two ways: *First*, by the purchase of property, with the consent of the legislature of the State, for certain specified purposes, as provided by article I, section 8, of the Constitution of the United States, and *second*, by ces-

sion of the jurisdiction by the State. When the constitutional provision is invoked and the proper conditions are fulfilled, the Federal government has exclusive sovereignty over the territory by virtue of such provision. It has no application to this case. The State, however, may cede jurisdiction to the United States over property, otherwise acquired than under the constitutional provision, and may grant it full political and legislative sovereignty, or make such reservations, as it pleases, not inconsistent with the free and effective use of the land for governmental purposes. How broad the cession may be is for the State to determine and the Federal government acquires jurisdiction solely from the cession, not at all from the Constitution, in such cases. *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525 (5 Sup. Ct. Rep. 995); *Chicago, etc., R. Co. v. McGlinn*, 114 U. S. 542 (5 Sup. Ct. Rep. 1005).

"The cession in question has been before this court and before the Supreme Court of this State in *Willis v. Oscar Daniels Co.*, 200 Mich. 19. The various propositions presented by defendant herein to limit the effect of the cession were presented in that case. It is there held that Act No. 17, Public Acts 1881, operated to cede to the United States exclusive jurisdiction over the land upon which the plaintiff's property was situated, except for the purpose of serving process. The cession is complete except as to the express reservation. Practically speaking, the property is not a part of the State of Michigan or the city of Sault Ste. Marie.

"Consequently the city has no legal right to assess taxes against the property of the plaintiff so situated.

"Defendant contends, however, that the cession does not invalidate the taxes because there was a tax law in operation over the property upon which plaintiff's goods were situated, in and prior to 1881, and such law continues to operate until congress acts. This position is untenable.

"1. Because the taxes in question were not levied under the law of 1881, or prior thereto, but were levied under the law of 1891 and amendments.

"2. Because a tax law is not a municipal law 'intended for the protection of private rights,' which

continues in force until abrogated or changed by the new sovereign or government, as stated in *Chicago, etc., R. Co. v. McGlinn, supra*. It is there said that the principle which controls as to laws in existence at the time of the cession is the same in cases of cession from the State to the Federal government as from one nation to another. Taxation is an essential and inherent attribute of sovereignty and an act thereof. 37 Cyc. p. 715. It is evident that the reservation of the right to continue to levy taxes upon property ceded by one sovereignty to another would need to be express in order to obtain.

"It is true that the property of Federal agencies may be taxed by the States. The property of the plaintiff would not be exempt merely because of its contract with the United States. It is the fact that it is not working and holding property within the jurisdiction of the State which relieves it from taxation in this instance." * * *

The act referred to in the stipulation and the opinion reads:

"An act to authorize the board of control to transfer the Saint Mary's Falls ship canal, with the property belonging to the same, to the United States.

"Whereas, congress at its last session included in the river and harbor bill the following:

"For improving and operating Saint Mary's river and Saint Mary's Falls canal, two hundred and fifty thousand dollars. 'And the secretary of war is hereby authorized to accept on behalf of the United States from the State of Michigan the Saint Mary's canal and the public works thereon: *Provided*, Such transfer shall be so made as to leave the United States free from any and all debts, claims or liability of any character whatsoever, and said canal after such transfer shall be free for public use: *And provided further*, That after such transfer the secretary of war be and hereby is authorized to draw from time to time his warrant on the secretary of the treasury to pay the actual expenses of operating and keeping said canal in repair'; therefore,

"SECTION 1. *The People of the State of Michigan enact*, That the board of control of the Saint Mary's Falls

ship canal be and hereby is authorized and directed to transfer the said canal and the public works thereon, with all its appurtenances and all the right and title of the State of Michigan in and to the same, to the United States, in accordance with [the] provisions of the above mentioned clause: *Provided*, That this cession is upon the express condition that the State of Michigan shall so far retain concurrent jurisdiction with the United States over the Saint Mary's Falls ship canal, and in and over all lands acquired or hereafter acquired for its use; that any civil or criminal process issued by any court of competent jurisdiction, or officers having authority of law to issue such process, and all orders made by such court, or any judicial officer duly empowered to make such orders, and necessary to be served upon any such person, may be executed upon said Saint Mary's Falls ship canal, its lands, and in the buildings that may be erected thereon, in the same way and manner as if jurisdiction had not been ceded as aforesaid.

"SEC. 2. The board of control of the Saint Mary's Falls ship canal are hereby authorized and empowered, at any time when they may deem it proper, to transfer all material belonging to said canal, and to pay over to the United States all moneys remaining in the canal fund, excepting so much as may be necessary to put the said canal in repair for its acceptance in accordance with the act above recited: *Provided*, Such transfer of material and payment of moneys shall be in consideration of the construction, by the United States, of a suitable dry dock, to be operated in connection with the Saint Mary's Falls ship canal for the use of disabled vessels.

"This act is ordered to take immediate effect.

"Approved March 3, 1881."

Appellant contends that the tax was rightfully laid, and, if not, that plaintiff, not having been admitted to do business in the State, is not in position to sue for recovery of the tax, and, finally, that in no event can there be recovered a greater amount than the city tax.

FELLOWS, J. (*after stating the facts*). Although not raised by counsel for appellee, the first question

presented by the record is whether there is anything before the court for its determination. It has been held that where no request for special findings is made and no findings in fact made and no exception taken, there is nothing to review. *Nichol v. Ward*, 156 Mich. 136; *Wilson v. Hugus*, 163 Mich. 577.

And it has been repeatedly held that where no exceptions are taken to any of the findings and it is not assigned as error, or contended, that the facts found do not support the conclusions of law, assignments of error in the admission and rejection of testimony and the sufficiency of the evidence to support particular findings cannot be reviewed. See cases cited in note to section 4, Rule No. 45, in Searl's Michigan Court Rules. We have concluded that as the facts have been stipulated and, as stipulated, they present a single principal question of law, we may consider the contention made in substance and effect in the assignments of error and argued in the briefs, whether they support the conclusion of law—the judgment.

Upon the main proposition as to whether the tax was rightfully laid, we are to consider whether the jurisdiction of the State extended for that purpose to any personal property situated and used on the ceded lands. If the territory is beyond the jurisdiction of the State and within the exclusive jurisdiction of Congress, as the trial court held, then the judgment is right. The point, it is said by appellee, is directly ruled by *Willis v. Oscar Daniels Co.*, 200 Mich. 19, where a construction was placed upon the proviso to the act of 1881 to the effect that—

“The jurisdiction reserved was for the purpose of providing there should be no neutral territory where civil and criminal process might not be served.”

And it must be admitted that the opinion of the circuit court in that case, quoted from at length in the opinion of this court, denies jurisdiction of the

State over the ceded territory. But this court did not adopt the opinion of the trial judge in that case; and, as will be pointed out, the opinion of this court does not, of necessity, deny all jurisdiction of the State in ceded territory. The question there before the court was the right of the State to regulate the relations, rights and liabilities of employees and employers engaged in the construction of governmental works—in their performance of the functions of the Federal government. The language there used must be limited, in its application, to the case then before the court. Here the question involved is whether the State surrendered its sovereign power of taxation. The case must turn upon the construction of the grant made by the State to the United States.

In *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525 (5 Sup. Ct. Rep. 995), and in *Chicago, etc., R. Co. v. McGlinn*, 114 U. S. 542 (5 Sup. Ct. Rep. 1005), the principles affecting a construction of the grant were exhaustively considered by the Supreme Court of the United States, with conclusions which, applied here, require, we think, a reversal of the judgment. As a fact in both cases, it appeared that the State of Kansas ceded to the United States exclusive jurisdiction over and within the territory known as the Fort Leavenworth reservation in that State, the title to which was in the United States, saving the right of the State to serve civil and criminal process within said reservation and saving further to said State the right to tax railroad, bridge and other corporations, their franchise and property, on said reservation. The State levied a tax on the track, right of way, franchises, road bed, telegraph line and instruments connected therewith on the reservation, the tax was paid under protest, and the suit was brought to recover the money so paid. It was the contention of the railroad company that the act of cession operated under the Con-

stitution of the United States to vest in the United States exclusive jurisdiction over the reservation and that the last saving clause, being inconsistent with that result, should be rejected. This contention the court rejected, holding—

“that a building on a tract of land owned by the United States used as a fort, or for other public purposes of the Federal government, is exempted, as an instrumentality of the government, from any such control or interference by the State as will defeat or embarrass its effective use for those purposes. But, in order that the United States may possess exclusive legislative power over the tract, except as may be necessary to the use of the building thereon as such instrumentality, they must have acquired the tract by purchase, with the consent of the State. (Art. I, § 8, subd. 17.) This is the only mode prescribed by the Federal Constitution for their acquisition of exclusive legislative power over it. When such legislative power is acquired in any other way, as by an express act ceding it, its cession may be accompanied with any conditions not inconsistent with the effective use of the property for the public purposes intended.”

Vide opinion in *Chicago, etc., R. Co. v. McGlinn, supra*. And in the second case it was held that a law of Kansas, passed before the cession of the reservation, making a railroad company whose right of way was unfenced liable for the value of stock killed by its trains upon such right of way, remained in force after the cession of the reservation, it having been contended, to defeat a judgment of the State court given for the value of cattle killed, that the act became inoperative within the limits of the reservation after the act of cession to the United States of exclusive jurisdiction over it.

In the case at bar there is not, in terms, as there was in the case of the Fort Leavenworth reservation, a cession to the United States of exclusive jurisdiction and, as the cession was not made upon purchase

by the United States and consent of the State thereto, there is no implication of a cession of exclusive jurisdiction except as the implication may be raised upon the proviso, which, however, reserves no legislative jurisdiction. And the jurisdiction expressly reserved may be accounted for upon the theory that for whatever reason the cession was made it was sufficient to confer exclusive jurisdiction in the United States to control the canal, any buildings and works connected with it, and with its operation for the purposes of its operation. There was no occasion for the State to cede exclusive jurisdiction to the United States, no apparent reason for denying to the State such jurisdiction, legislative and other, as did not interfere with the control by the United States of the property transferred for the purposes of the transfer.

We construe the grant itself as a cession of less than exclusive jurisdiction, and the proviso as it was construed in *Willis v. Oscar Daniels Co.*, *supra*. In this view, the ceded territory is not out of the State of Michigan so far as the operation of its tax laws is concerned, but is within the State. The tax levy in question was properly made, and the tax was a lawful one.

Willis v. Oscar Daniels Co., *supra*, may, and should, rest upon the ground that the State legislation sought there to be enforced affected the United States in a matter over which it had exclusive jurisdiction, namely, the building of a lock in the ceded territory.

The matter and language of this opinion are largely those of the late Justice OSTRANDER which are now formulated into this opinion of the court.

The judgment is reversed and a new trial granted, with costs to appellant.

BIRD, C. J., and MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

KROLIK v. KACZMAREK.**1. FRAUDULENT CONVEYANCES—BULK SALES LAW—PURPOSE.**

The purpose of the "Bulk Sales Law" (2 Comp. Laws 1915, §§ 6346-6348) being to protect creditors, a sale made in violation thereof is void only as to creditors; being valid as between the seller and buyer.

2. EQUITY—FRAUDULENT CONVEYANCES—BULK SALES LAW, SALE IN VIOLATION OF EQUITIES BETWEEN BUYER AND SELLER—"CLEAN HANDS."

Where the sale of a stock of goods sold in violation of the "Bulk Sales Law" failed by reason of the same being taken to satisfy the creditors, the seller could not hide behind the statute and thus avoid liability to the buyer, and the court of equity will not permit the seller in such case to retain the purchase price; the doctrine of "clean hands" having no application.

Appeal from Wayne; Tappan (Harvey), J., presiding. Submitted June 3, 1919. (Docket No. 21.) Decided December 23, 1919.

Bill by Henry A. Krolik and others, copartners as A. Krolik & Company, against Joseph Kaczmarek and Valentine Adamaszek to set aside a sale of goods in violation of the bulk sales law. Defendant Adamaszek filed a cross-bill to set aside the assignment of a land contract and for the cancellation of a note. From a decree granting the prayer of the cross-bill, defendant Kaczmarek appeals. Affirmed.

Sol. Blumrosen, for appellant.

L. C. Turek, for appellee.

STONE, J. This case presents a controversy between the defendants upon an issue presented by the cross-bill of the appellee against the appellant. On

On remedy of creditors where sale is made in violation of bulk sales law, see notes in 39 L. R. A. (N. S.) 374, and L. R. A. 1916B, 974.

April 13, 1917, the appellant was the owner of a stock of goods and fixtures located in a store at 435 Forest avenue east in the city of Detroit. The appellee and his wife owned an equity in a certain land contract covering land and premises described in the pleadings and decree herein. The appellant, a few days before the above date, agreed with appellee to exchange said stock of merchandise and fixtures for the equity which appellee and his wife had in said land contract. An inventory was made of the stock of merchandise and fixtures, and a balance was struck by which the appellee gave to the appellant a sixty-day promissory note for the sum of \$541, and appellee and his wife transferred by assignment their equity in the land contract to appellant.

The appellant executed, on said April 13, 1917, a bill of sale of said stock of merchandise and fixtures to said appellee, which contained the following provision:

"And the said party of the first part, for himself, his heirs, executors and administrators, does covenant and agree to and with the said party of the second part, his executors, administrators and assigns, to warrant and defend the sale hereby made of said property, goods and chattels, unto the said party of the second part, his executors, administrators and assigns, against all and every person or persons whatsoever, and agrees to pay all debts to whomsoever they may be due, up to this day, on said stock, and which debts amount to about \$960.00."

In this sale and transaction the parties thereto wholly ignored, and did not in any respect comply with the terms of the statute known as the "bulk sales law" (2 Comp. Laws 1915, §§ 6346-6348). The appellee took possession of the stock of goods and fixtures, and handled the same until this suit was instituted. The appellant took possession of the said real estate. At the time of the said sale and exchange,

the appellant was indebted to Henry A. Krolik & Company, plaintiffs herein, in the amount of \$430.

On May 8, 1917, the plaintiffs instituted this suit and filed their bill of complaint, because of the violation of the "bulk sales law" by defendants, and a receiver was appointed. All parties, as appears by the record, conceded that the claim of the plaintiffs was well founded, and other creditors of the appellant joined in the suit, and debts were proved aggregating approximately \$1,100. There was a sale of the stock by the receiver.

At first a default was entered against the appellee for failure to answer the bill of complaint. Later, and after the sale by the receiver, the default was set aside and appellee was given the right to file a cross-bill against the appellant. In his cross-bill appellee demanded and prayed for the return of his equity in the land contract and cancellation of the said note. Appellant answered the cross-bill of appellee, among other things, denying that the latter was entitled to any relief. At the hearing and at the conclusion of the testimony, the court, by its decree, among other things, ordered the said promissory note to be canceled and to be delivered to the court for cancellation, and also ordered the assignment of the land contract to be canceled, and declared null and void, and directed the appellant to re-assign said land contract to appellee upon payment of \$220.98.

From such parts of the decree as are above recited, and as affect the appellant, he has appealed. So it appears that this appeal affects only the appellant and appellee, and no attempt is here made to affect the standing of the plaintiffs in the case.

The learned circuit judge seems to have been of the opinion that the appellant was responsible for the condition of the parties, and he sought to place them *in statu quo*. The only question possessing any merit

that is presented by the appellant as a reason for reversal is that the case is controlled by the case of *Farrar v. Lonsby Lumber & Coal Co.*, 149 Mich. 118, and that the parties having acted in violation of law, the appellee does not come into court with clean hands and hence cannot prevail. It should be borne in mind that the instant case presents a situation of the entire failure of consideration for the sale. The whole trend of our decisions, as well as the decisions of other courts construing statutes similar to our bulk sales law, is to the effect that the purpose of this and similar acts is to protect creditors; and that a sale made in violation of the statute is void only as to creditors. *Spurr v. Travis*, 145 Mich. 721 (9 Ann. Cas. 250); *Musselman Grocer Co. v. Kidd, Dater & Price Co.*, 151 Mich. 478; *Squire v. Tellier*, 185 Mass. 18 (69 N. E. 312).

Such sale as between the seller and buyer is valid; and if the seller has been guilty of any fraud to the injury of the buyer, or if there has been an entire failure of the consideration, the seller cannot hide behind the statute and thus avoid liability to the purchaser.

What was held in *Farrar v. Lonsby Lumber & Coal Co.*, *supra*, is that a sale void as to creditors cannot, as between the parties, be made to operate to give the vendee a lien for the money he has paid. The remedy sought in that case was against the property (or the proceeds of it) sold in violation of the bulk sales law. In the case at bar, the remedy sought by the vendee in no way affects the rights of creditors of the seller of the goods, but is aimed at a recovery from the seller of the property given in exchange for the goods.

Here, confessedly, is a void sale as to creditors of a stock of goods and the vendee gave the vendor a note and a land contract in payment. Creditors of the vendor have successfully attacked the sale. The

vendee gets nothing. The goods, or their value, go to pay the vendor's debts, and he also profits by the note and land contract which he received from the vendee. Assuming that in this proceeding, all parties being before the court, the court has power to settle and adjust all rights, it seems to us inequitable to deny to appellee what the court below gave him, cancellation of his assignment of the land contract and return of his promissory note. The question lies wholly between the vendor and the vendee, affects creditors not at all, and the doctrine that one must come into a court of equity with clean hands in order to obtain relief has, in our opinion, no application. As we have said, it would be most inequitable to permit the vendor to retain the purchase price of the stock of goods while subjecting the stock to the payment of his debts.

The decree below is affirmed, with costs to the appellee.

BIRD, C. J., and MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

The late Justice OSTRANDER took no part in this decision.

VYSE *v.* RICHARDS.**1. DISMISSAL AND NONSUIT—PLEA IN BAR NOT AVAILABLE ON MOTION TO DISMISS.**

Demurrers, pleas in abatement, and pleas to the jurisdiction having been abolished by 3 Comp. Laws 1915, § 12456, their function is now performed by a motion to dismiss, but it does not perform the function of a plea in bar, and defenses which formerly required a plea in bar cannot be made under the summary proceeding of a motion to dismiss.

2. SAME—LIMITATION OF ACTIONS NOT AVAILABLE ON MOTION TO DISMISS.

The defense of the statute of limitations, being a bar to the action, must be pleaded in order to be available, and cannot be raised by a motion to dismiss in the nature of a demurrer.

3. SAME—RES JUDICATA NOT AVAILABLE ON MOTION TO DISMISS.

The defense of former adjudication, or *res judicata*, must be pleaded in bar and cannot be raised by motion to dismiss.

Appeal from Wayne; Hart (Burton L.), J., presiding. Submitted October 30, 1919. (Docket No. 37.) Decided December 23, 1919.

Bill by Charles Vyse and others against Mary A. Richards and another to impress a trust upon real estate and for an accounting. From an order overruling a motion to dismiss, defendants appeal. Affirmed.

Hollis Harshman and *Howard H. Campbell*, for plaintiffs.

Marion Kuhn (*William E. Henze*, of counsel), for defendants.

Briefly stated the facts alleged in the bill are these: In the year 1902 sums aggregating \$15,960 were by Charles L. Fish placed in the hands of defendant Mary A. Richards in trust for Tillie A. Vyse, a considerable portion to be invested in real estate; that in 1903 some \$12,100 of this fund was devoted to the purchase of real estate but the title thereto was taken in the names of defendants Mary A. Richards and Maud A. Kuhn, mother and sister of said Tillie A. Vyse; that said Tillie A. Vyse lived in Cleveland, Ohio, had entire confidence in her mother and sister, was inexperienced in business, and believed that the terms of the trust had been performed. It is alleged that the title to the real estate was so taken in the names of defendants in order to defraud her; that in 1905 certain litigation was begun in the Wayne circuit court, in chancery, against said Tillie A. Vyse, Mary A. Richards, and Maud A. Kuhn; that in furtherance of the scheme to defraud, the mother and sister lulled said Tillie A. Vyse to inactivity in said litigation, and assured her that her rights would be protected; that in 1909 defendants attempted to obtain from said Tillie A. Vyse when she was ill a release of her interest in said real estate; that she then learned for the first time that the title was not in her; that said Tillie A. Vyse died in 1910, and that plaintiffs are her heirs at law; that the litigation above referred to was pending at her death and extended over a period of years; and that due to such litigation, and to avoid family trouble, plaintiffs withheld suit. The language of the bill in some regards is quite general; the date when the litigation was concluded or its character do not appear from it. The bill seeks to impress the trust upon the real estate and prays for an accounting.

The answer denies the equities of the bill; specifically denies all charges of fraud; as to the litigation commenced in 1905, it alleges that said Tillie A. Vyse

had full knowledge thereof, appeared by separate counsel, that a decree was taken therein in favor of the complainant, the administrator of the estate of said Charles L. Fish, deceased, for upwards of \$26,000, and that defendants paid \$21,500 in settlement thereof. It was apparently patent to the pleader that the questions here sought to be raised could not be determined from an examination of the bill alone. By some 27 exhibits attached to the answer defendants show the pleadings, proceedings, affidavits and other papers giving a complete record of the Fish case and its final settlement, together with definite dates. With this answer defendants filed a motion to dismiss. To review an order overruling the motion to dismiss, this appeal was allowed.

FELLOWS, J. (*after stating the facts*). In this court it is urged on behalf of the defendants, and the questions raised by the motion to dismiss are: (1) that the cause of action is barred by the statute of limitations; and (2) that the decree in the case brought by the administrator of the estate of Charles L. Fish, deceased, against these defendants and Tillie A. Vyse is *res adjudicata*. Plaintiffs insist that these questions may not be raised on this record by motion to dismiss.

By section 4, chapter 14, Act No. 314, Pub. Acts 1915 (3 Comp. Laws 1915, § 12456), demurrers, pleas in abatement, and pleas to the jurisdiction, are abolished and a motion to dismiss is substituted. In the recent case of *Pagenkoff v. Insurance Co.*, 197 Mich. 166, this court had this section of the statute under consideration. We there pointed out that the motion to dismiss now performs the function of a demurrer, a plea in abatement, and a plea to the jurisdiction, but that it does not perform the function of a plea in bar, and that defenses which formerly required a

plea in bar cannot be made under the summary proceeding of a motion to dismiss; and in *Gunn v. Gunn*, 205 Mich. 198, we declined to consider on a motion to dismiss in the nature of a demurrer anything but the allegations of the bill itself. In the instant case the motion to dismiss performs the function of a demurrer under the former practice.

Under the repeated decisions of this court the statute of limitations must be pleaded and the defense cannot be raised by demurrer. *Whitworth v. Pelton*, 81 Mich. 98; *Shank v. Woodworth*, 111 Mich. 642; *Renackowsky v. Board of Water Com'rs*, 122 Mich. 613; *First National Bank v. Steel*, 136 Mich. 588; *Township of Forest v. American Bonding Co.*, 180 Mich. 90. The defense is a bar to the action and should be so pleaded in order to be available. Likewise this court has also held that the defense of former adjudication, the question of *res adjudicata* must be pleaded in bar and cannot be raised by motion to dismiss. *Attorney General v. Railway Co.*, 149 Mich. 122, citing *Briggs v. Milburn*, 40 Mich. 512. See, also, *Pagenkoff v. Insurance Co.*, *supra*; *Porter v. Leache*, 56 Mich. 40.

The chancellor was right in denying defendants' motion to dismiss. His order is affirmed, with costs to the plaintiffs.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

MORRIS v. ALEXANDER.

1. FIXTURES—EVIDENCE—INTENTION—ADMISSIBILITY.

In replevin to recover possession of certain garage tools and machinery claimed by plaintiff to be fixtures and to have passed to him by deed from defendant mortgagor to save foreclosure of real estate mortgage, testimony that the articles were not permanently attached to the real estate, that they could be, and were, removed without injury to the building, that they were installed by defendant for the purpose of carrying on his trade with no intent to make them permanent fixtures, that they were not specially designed for use in this particular building but were adapted for use in any building, *held*, admissible and for the consideration of the jury as to whether they were fixtures.

2. SAME—JUDICIAL NOTICE—QUESTION FOR JURY.

While in some cases the court may take judicial notice that articles are so attached as to become a part of the realty, it cannot be said upon this record, as matter of law, that the articles here involved are fixtures, and the trial court properly submitted the case to the jury.

Error to Sanilac; Beach (Watson), J. Submitted October 22, 1919. (Docket No. 118.) Decided December 23, 1919.

Replevin by Hugh Morris against Joseph Alexander for the possession of certain tools and machinery. Judgment for defendant. Plaintiff brings error. Affirmed.

C. F. Gates and *Fred A. Farr*, for appellant.

W. H. Burgess, for appellee.

Defendant was the village blacksmith at Sandusky until the advent of the automobile when he put into

his shop the necessary tools and appliances and thereafter conducted a garage. Plaintiff held a mortgage on the shop and other property. Defendant being unable to pay the mortgage he executed a deed of the premises to the plaintiff for a consideration of \$150, the estimated cost of foreclosure. The premises were described in the deed by lot numbers and no mention was made of the shop or garage, or of the machinery therein. After the execution of the deed, defendant removed from the garage certain tools and machinery used by him in the conduct of his trade, and this action of replevin was brought by the plaintiff to recover their possession. They are enumerated in the writ and declaration as follows:

“One swedge block; one anvil; one lathe, 11-inch swing, 5 feet over all; one vise, disconnected; one tool bench and cabinet, with vise attached; one air compressor or pump; one emery arbor and stand; one countershaft outfit for lathe; one countershaft which connects with emery arbor; one 1½-inch line shaft with 5 pulleys, 2 hangers and 3 boxings attached; eight pieces of iron piping which connect air compressor or pump with hose and air gauge; one bellows or blower, including the Tue-iron used in connection therewith; one vulcanizer, complete; one power drive belt, which extends from engine; one drive belt, which connects air compressor or pump with line shaft; three drive belts which extend from lathe; and two drive belts which connect said emery arbor with line shaft.”

The case was submitted to the jury, resulting in a verdict for the defendant, upon which verdict judgment was entered. Plaintiff brings the case here, and in the brief of his counsel claims that error was committed by the trial judge in the following particulars:

“(1) By the court's holding that the secret workings of the grantor's mind could affect the question as to what was fixtures.

“(2) By the holding that if such fixtures could be of use in any other building they could be removed.

"(3) By the holding that they would not be fixtures unless constructed for the particular building.

"(4) For the court holding, in substance, that no property manufactured for general use could become a fixture.

"(5) In the court not directing a verdict for the plaintiff."

FELLOWS, J. (*after stating the facts*). The question involved in the case was whether the enumerated articles were fixtures and passed to plaintiff under the deed. There were no requests with reference to any of the specified articles; it was claimed by the plaintiff that he was entitled to all of them except the vulcanizer, which was conceded to belong to defendant, and plaintiff's counsel asked for a directed verdict as to all of them except the vulcanizer. We have given the grounds stated by plaintiff's counsel in their brief upon which plaintiff seeks a reversal, but what the record discloses is that the trial judge permitted evidence to be received tending to show the intent of the defendant when the articles were installed, whether they were constructed for this particular building or were adaptable for use in any building, whether they could be removed without injury to the building, and permitted the jury to consider such testimony in reaching a conclusion upon the ultimate question of whether they were or were not fixtures. There was testimony tending to show that the articles were not permanently attached to the real estate, that they all could be, and were, removed without injury to the building, that they were installed by defendant for the purpose of carrying on his trade and with no intent to make them a permanent fixture and a part of the real estate; that they were not specially designed for use in this particular building but were adapted for use in any building, and were in common use in garages. The trial judge was not in error in receiving this testimony

or in permitting its consideration by the jury. *Robertson v. Corsett*, 39 Mich. 777; *Wheeler v. Bedell*, 40 Mich. 693; *Ferris v. Quimby*, 41 Mich. 202; *Scudder v. Anderson*, 54 Mich. 122; *Manwaring v. Jenison*, 61 Mich. 117; *Lansing Iron & Engine Works v. Wilbur*, 111 Mich. 413; *Aldine Manfg. Co. v. Barnard*, 84 Mich. 632. In the last-cited case it was said:

"It is true that there is no universal test whereby the character of what is claimed to be a fixture can be determined in the abstract; that neither the mode of annexation nor the manner of use is in all cases conclusive; yet these considerations are frequently of much importance in arriving at the intention of the parties, which is the real test. It is now well settled in this State that whether an article attached to the freehold becomes a fixture depends largely upon the intention of the parties."

In *Robertson v. Corsett*, *supra*, it was said by this court:

"No single article of this machinery was made expressly for use in the building where it was placed, and not elsewhere; all of it was equally capable of beneficial use on being removed to and set up in some other building. It might therefore become a part of the real estate when affixed to it, if such was the intent, or it might remain personal estate if an understanding to that effect was clearly indicated or fairly deducible from the circumstances."

Ruling Case Law (Vol. 11), p. 1,059, after stating that the general tendency of the modern decisions, both English and American, is against the common-law doctrine that mode of annexation is the criterion, says:

"This has led to the formulation and recognition of three general tests which may be applied in determining a particular case, namely, first, annexation to the realty, either actual or constructive; second, adaptation or application to the use or purpose to which that part of the realty to which it is connected is ap-

propriated; and third, intention to make the article a permanent accession to the freehold."

And in the same work, at page 1,092 of the same volume, it is further said:

"Generally, the question whether or not a particular article is a chattel or fixture is a mixed question of law and fact, though when the facts are admitted or undisputed the question of law only remains. When the particular case involves a consideration of the tests of the mode of annexation, the purpose or use to which the article is to be put, and the intention, this takes the case to the trier of the facts."

But one case is cited by plaintiff's counsel in their brief, that of *Wickes Bros. v. Hill*, 115 Mich. 333. The property involved in that case was an engine, boiler, shafting and other articles necessary for the equipment of a shingle mill, and the following excerpt from the opinion in that case is made much of by counsel:

"We may take judicial notice of the fact that some of such machinery as was here sold is usually attached so as to become a part of the realty, and a deed of the realty carries with it the title to the machinery."

And it is insisted that upon the authority of that case we should take judicial notice that the articles here involved are fixtures and so hold as a matter of law. While we may take judicial notice that such articles as were involved in the *Wickes Bros. Case* are *usually* so attached as to become a part of the realty, we do not take judicial notice that they are *always* so attached. In *Schellenberg v. Lighting Co.*, 130 Mich. 439 (57 L. R. A. 632), a chancery case, we held under the facts of that particular case that certain boilers were not fixtures. We cannot say upon this record, as matter of law, that the articles here involved are fixtures. The trial judge properly submitted the case

to the jury. As was said by this court in *Scudder v. Anderson, supra*:

"The court below could not, as matter of law, hold any of the property in dispute as necessarily fixtures. At best, it was of ambiguous capacity, and might or might not be so regarded."

The judgment is affirmed.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

JONES v. TITUS.

1. MORTGAGES—FORECLOSURE—FRAUD—BURDEN OF PROOF.

In a suit to set aside a mortgage, to restrain its foreclosure, and to hold it invalid in the hands of defendant, assignee, for fraud in its inception, where defendant, by cross-bill, seeks affirmative relief by way of foreclosure, the burden is upon him to show *bona fides* in the assignment.

2. SAME—INDORSEE OF NOTE EQUITABLE OWNER OF MORTGAGE.

When a note given with a mortgage was indorsed over to a third party it carried with it the equitable title to the mortgage.

3. NAMES—ASSUMED NAME—STATUTES.

A bank cashier, assignee of a mortgage in his own name, was not precluded from foreclosing same by Act No. 101, Pub. Acts 1907 (2 Comp. Laws 1915, § 6349 *et seq.*), requiring any person or persons doing business under an assumed name to file a certificate, etc., because the bank, to facilitate its bookkeeping, had devised a system of handling past-due paper by assigning it to the cashier as "Trustee

for Trust Mortgage Syndicate," where the testimony shows that this name was used only as a memorandum, apparently for the purpose of carrying the account and to prevent the "charging off" of these items.

4. MORTGAGES—FRAUD—ASSIGNEE—BONA FIDES.

The finding of the court below that the bank, assignee of the mortgage, was a holder in good faith and entitled to foreclosure, *held*, supported by the record, although it is disclosed that plaintiff was defrauded in the transaction involving the making of the mortgage.

Appeal from Grand Traverse; Mayne (Frederick W.), J. Submitted October 14, 1919. (Docket No. 40.) Decided December 23, 1919. Rehearing denied April 10, 1920.

Bill by Elnora Jones against Leon F. Titus and another to set aside a mortgage on the ground of fraud. Defendant Titus filed a cross-bill for the foreclosure of the mortgage. From a decree for defendants, plaintiff appeals. Affirmed.

Edward N. Barnard (E. A. Maher, of counsel), for plaintiff.

Patchin & Duncan, for defendants.

FELLOWS, J. November 22, 1913, the plaintiff, Elnora Jones, and her son, Orvis Grant Jones, entered into an agreement with one George B. Updegrove by the terms of which they purchased from Updegrove the formula and exclusive right to manufacture and sell in the District of Columbia and the State of Maryland a certain preparation called "Earthquake," said to be used for cleaning carpets, rugs and other fabrics. The purchase price was \$10,000; \$3,000 to be paid on the execution of the agreement, and the balance when their profits on the sale of "Earthquake" had amounted to the sum of \$70,000. The plaintiff then owned two pieces of real estate in Traverse City; upon one of them was a mortgage for \$500. To make

the payment of \$3,000, plaintiff executed a mortgage to Updegrove for \$1,500 upon one of the pieces, and upon the other a mortgage to Updegrove for \$2,000, Updegrove agreeing to pay, and paying, the \$500 mortgage thereon. It had been represented to plaintiff and her son that "Earthquake" was a new and patented preparation; much had been claimed for it by Updegrove; it was represented that the territory they bought had not been worked; that it was "virgin territory," and that much money could be made by the sale of the preparation. Plaintiff and her son went to the territory they had purchased and remained there a few months. It was the old story. The territory had been worked before; under other names the same preparation had been marketed; those who had bought it never bought again; as plaintiff expressed it, Updegrove "sold me nothing but a soft soap formula."

On December 2, 1913, Updegrove applied to the defendant Leon F. Titus, cashier and executive officer of the defendant First National Bank of Traverse City, for a loan of \$1,500, offering the Jones mortgage for \$2,000 as collateral. He had before that cashed several checks drawn on his own bank, but had had no other business dealings with the Traverse City bank. The abstract was examined, the security was known to Mr. Titus, it was ample, the loan was made, and the Jones note was indorsed over to the bank, and it and the mortgage were left as collateral to secure the loan. One thousand dollars was drawn by Updegrove that day and the balance later. The note was due in four months. It was not paid when due, and on April 6, 1914, Updegrove executed a formal assignment of the mortgage to the bank, and a request was made by him, and granted, for an extension of time. It would appear that the interest for the four months was at this time paid.

Upon Mrs. Jones' return to Traverse City she learned that Updegrove had sold the \$1,500 mortgage to one Strickler, but she did not learn of the transfer of the \$2,000 mortgage to the bank as collateral to the loan of \$1,500. On May 2, 1914, she filed a bill in the circuit court for the county of Grand Traverse, in chancery, against Updegrove, setting up the transaction with him, the fraud perpetrated on her, the fact of the transfer of the mortgage to Strickler, that he had purchased it for a full consideration and in good faith, and asked an injunction against Updegrove to restrain him from disposing of the \$2,000 mortgage. Before the case was heard the transaction between Updegrove and the bank came to plaintiff's knowledge, and, while the case was pending, and on November 27, 1914, she paid to the bank \$120, the annual interest on her mortgage held by the bank as collateral to the Updegrove loan. She obtained and took a decree against Updegrove for the amount she would have to pay to Strickler and to the bank to obtain discharge of her mortgages, less the amount paid by Updegrove to discharge the \$500 mortgage. This decree was dated October 1, 1915. Neither the bank nor Mr. Titus was made party to this suit.

The Updegrove note to the bank for \$1,500 was not paid and the collateral, the Jones note and mortgage, was put up and sold; it was bid in by Mr. Titus, and on February 12, 1916, the bank executed an assignment of it to him in his individual name.

On April 23, 1917, this bill was filed. By it plaintiff seeks to set aside the mortgage given by her to Updegrove for \$2,000, to restrain its foreclosure, and for a decree holding it invalid in the hands of defendants. By way of cross-bill, in his answer defendant Titus seeks foreclosure of the mortgage only to the extent of the amount of the loan to Updegrove with its accrued interest. The trial judge, who heard the

case, found that the bank and Mr. Titus took this mortgage as collateral to the Updegrove loan in good faith; that Mr. Titus, who acted for the bank in the transaction, had no knowledge or notice of plaintiff's equities, and a decree was entered dismissing plaintiff's bill and for foreclosure of the mortgage. A careful reading of this record satisfies us that the trial judge was quite right. There is ample evidence that Mrs. Jones has been defrauded by Updegrove. As defendant Titus is here seeking affirmative relief by way of foreclosure of the mortgage, the burden is upon him to show *bona fides* in the transaction. This we are satisfied he has done. He testified unequivocally to facts showing good faith in the transaction; all the books and records of the bank called for by plaintiff's counsel were produced and they corroborated his testimony, and upon this record there is nothing to refute it. Indeed, plaintiff's counsel insists that Mr. Titus was not sufficiently active and vigorous in attempting to discover Updegrove's fraud before he accepted the note and mortgage as collateral. Had plaintiff, before she executed these mortgages, exercised a tithe of the vigor to discover the fraud of Updegrove her counsel now insists the bank should have exercised before it made this loan in a regular business way upon ample security, it is highly improbable there would have been any occasion for this litigation. There is nothing upon this record that would justify us in concluding that this collateral was not taken by the bank in the ordinary course of business, nothing to indicate bad faith, nothing to impeach this paper in the hands of the bank, or of Mr. Titus. We do not overlook plaintiff's claim that when the mortgage and note were deposited as collateral a formal assignment of the mortgage was not executed, nor the intimation that when the formal assignment was made it was dated back. When the Jones note was indorsed over

to the bank, it carried with it the equitable title to the mortgage (*John Schweyer & Co. v. Mellon*, 196 Mich. 590); and there is no testimony in this record and nothing from which we could infer that the formal assignment was executed at any other date than the one it bears and the one all the witnesses testify was the actual date of its execution.

But it is urged by plaintiff's counsel that Mr. Titus dealt with this mortgage under an assumed name, that of "Trustee for Trust Mortgage Syndicate" in violation of Act No. 101, Public Acts of 1907 (2 Comp. Laws 1915, § 6349 *et seq.*), and therefore cannot enforce it under repeated decisions of this court. The bank held among its assets certain past due real estate mortgages. It devised a system of its own for handling this past due paper and to facilitate its bookkeeping. The cashier gave to the bank a note with these past due mortgages as collateral signed by him as "trustee for trust mortgage syndicate." The testimony shows that this name was used only as a memorandum, apparently for the purpose of carrying the account, and possibly with the idea of preventing the "charging off" of these items. Without commending this plan of carrying past due paper as live assets, we do not perceive that the statute in question inhibited Mr. Titus, who took an assignment of this mortgage in his own name, and not in the name of, or as trustee for the trust mortgage syndicate, from foreclosing it. *Rossello v. Trella*, 206 Mich. 20.

While this record discloses that plaintiff was defrauded by Updegrove, against whom she has a decree, there is no testimony tending in any way to establish that defendants were a party to such fraud, and no testimony justifying the conclusion that they had any knowledge or notice of such fraud when they made the loan to Updegrove, or that the transaction smacks in any degree of bad faith on their part. Nor is any

reason shown why they, or either of them, should be required to assume any portion of plaintiff's loss from her unfortunate investment.

The decree of the court below will be affirmed, with costs to defendants.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

McBRIDE v. CLOSSER.

1. TAXATION—TAX SALES—NOTICE TO REDEEM—SUFFICIENCY.

Where a tax title purchaser went into possession without giving a notice to redeem that complied with the provisions of Act No. 229, Pub. Acts 1897 (1 Comp. Laws 1915, § 4138 *et seq.*), the notice given by him was void and of no effect, and he was a trespasser from the beginning, and therefore not entitled to recover for his improvements.

2. SAME—EQUITY—INJUNCTION—EJECTMENT BY OWNER.

Said act, being a beneficent one, must be recognized by courts of equity as well as law, and therefore equity will not restrain ejectment brought by the owner.

3. SAME—FRAUDS, STATUTE OF—ORAL STATEMENTS OF OWNER—ESTOPPEL—WAIVER.

Statutory proceedings which divest the owner of his property must substantially comply with the provisions of the statute, and where a tax-title buyer failed to give the statutory notice to redeem, his title was void, and the defect was not waived by oral statements of the owner that he did not intend to redeem, since the title to real estate does not rest in parol, and is not acquired or lost by casual conversations.

Appeal from Chippewa; Hart (Ray), J., presiding. Submitted October 9, 1919. (Docket No. 17.) Decided December 23, 1919.

Bill by James McBride against Dayton W. Closser to enjoin an action of ejectment and to quiet title. From a decree dismissing the bill, plaintiff appeals. Affirmed.

John W. Shine, for plaintiff.

Davidson & Hudson, for defendant.

FELLOWS, J. The litigation between these parties concerning the premises here involved was before this court in *Closser v. McBride*, 182 Mich. 594. That was an action of ejectment brought by Mr. Closser against this plaintiff to recover the possession of these premises. Plaintiff here (defendant there) defended under certain tax proceedings. It was there held by this court, adopting the opinion of the trial judge, that the tax notice was void, that defendant there was but a trespasser and was not entitled to recover for improvements placed on the premises. After the *remittitur* from this court was filed, application for a second trial was made, which application was refused. In *McBride v. Chippewa Circuit Judge*, 202 Mich. 61, this court granted a writ of mandamus directed to the circuit judge requiring him to vacate such order, holding that the application for a new trial should have been granted. Subsequently this bill was filed to restrain the further prosecution of such ejectment suit and to quiet plaintiff's title to the premises. From a decree dismissing the bill on defendant's motion, plaintiff appeals.

It is here urged that this bill is maintainable upon the theory that plaintiff's title to the premises may be sustained upon equitable grounds, which equitable

grounds are not matters of defense upon the law side of the court in the ejectment suit. These equitable grounds are alleged to be that after plaintiff had received his tax deed from the auditor general, and had given a notice to the then owner of the premises, he endeavored to have such owner redeem from the tax sale; but that he was informed by the owner that the land was not worth the amount of the taxes and that he did not intend to redeem; that relying upon these statements he made certain improvements on the premises; that the owner was guilty of laches in not paying taxes for a great many years and that his grantee is now estopped from asserting title to the premises in question.

The cases most strenuously relied upon by plaintiff are *Olsen v. Williams*, 172 Mich. 316, 185 Mich. 294; *Rogers v. Davison*, 188 Mich. 519. In the *Olsen Case*, which was before this court on demurrer and later on the merits, the complainant had acquired title to tax homestead lands under the provisions of section 131, Act No. 206, Public Acts of 1893, as amended (1 Comp. Laws 1915, § 4130). He was in possession of the premises under a deed which at least purported to give him a right to possession. The bill was filed to restrain a multiplicity of suits. We held that, under the facts of that case, the defendant was guilty of such laches as precluded him from successfully controverting complainant's title. In the *Rogers Case* we held the tax notice was insufficient, that being the only question involved in the case. This court has also held that laches of the owner may preclude him from appealing to a court of equity for relief from irregular tax proceedings: *Beuthien v. Dillon*, 160 Mich. 396; *Clothier v. Miller*, 173 Mich. 530; *Owens v. Auditor General*, 147 Mich. 683. In each of these cases the owner sought by bill in equity to set aside and vacate decrees entered many years before in tax proceedings;

laches was held to preclude such relief. But in the instant case the plaintiff went into possession without giving a notice that complied with the provisions of Act No. 229, Public Acts of 1897 (1 Comp. Laws 1915, § 4138 *et seq.*) ; the notice given by him was void and of no effect. It was the same as though no notice was given. He was a trespasser from the beginning. The beneficent purpose of this act is well known to all. The act must be recognized as well by courts of equity as courts of law. A complete answer to the plaintiff's contention is found in the language of Chief Justice GRANT, speaking for the court, in the case of *G. F. Sanborn Co. v. Alston*, 153 Mich. 456, where the same act was under consideration, and the same contention was made. We said:

"The act of 1897 was not designed to assist only those who had been diligent and free from fault. The failure to pay taxes is, in most cases, the result of negligence and involves laches. The statute covers all cases where the purchaser has acquired the tax title at the public sales or by purchase of the title acquired by the State. It was regarded as sufficient punishment to the original owner and sufficient compensation to the tax purchaser to require the owner to pay double the amount which the purchaser paid and certain other items. To sustain this contention on behalf of the defendants would result in rendering the act of 1897 inapplicable to a great majority of tax titles. It may well be conceded that the complainant in this case, which stands in the shoes of the original owners, does not deserve any consideration in a forum of equity. Courts of equity, however, as well as of law, must apply legislative enactments in accordance with the plain intent and language used by the legislature. The requirements of the act are not difficult to understand, and compliance therewith is easy. He who relies upon the notices required by the statute must show a substantial compliance therewith, regardless of any fault or laches of the original owner."

All the precedent tax proceedings may be regular and valid, but title in fee does not ripen, or right of possession accrue until there has been a substantial compliance with the provisions of this act. Statutory proceedings which divest the owner of his property must substantially comply with the provisions of the statute, and as title to real estate does not rest in parol, it is not acquired or lost by casual conversations.

Nor are we persuaded that plaintiff is entitled to recover the value of his improvements. He entered the premises without complying with the act in question. Under such circumstances he is a trespasser and is not entitled to recover for his improvements. *Corrigan v. Hinkley*, 125 Mich. 125; *Cook Land, etc., Co. v. McDonald*, 155 Mich. 175; *Closser v. McBride, supra*. In *Cook Land, etc., Co. v. McDonald, supra*, this court said:

"The defendant is not entitled to recover for his improvements. Under *Corrigan v. Hinkley, supra*, he was a trespasser, and was presumed to know the law. The very terms of his deed gave him notice that it was subject to the provisions of that act. He acted in direct violation of its terms, and must be content with what benefits he has obtained from the land during his occupancy. We in that case distinctly held that one entering into possession in contravention of the act could not recover for improvements."

It follows from what we have said that the decree appealed from must be affirmed. Defendant will recover costs of this court.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

**PEACOCK v. DETROIT, GRAND HAVEN & MILWAUKEE
RAILWAY CO.****1. RAILROADS—NOT LIABLE FOR NEGLIGENCE OF LESSEE.**

A railroad company which has leased its property to another is not liable for the negligent acts of such other.

2. SAME—OPERATION BY GOVERNMENT—RELATION OF LESSOR AND LESSEE.

During the control of the railroads as a war measure by the United States government by a director general (39 U. S. Stat. p. 645, 40 U. S. Stat. p. 1733, 40 U. S. Stat. p. 451 *et seq.*) the relations between a railroad and the government were either technically those of lessor and lessee or analogous thereto.

3. PLEADING—DEFENSES—AFFIRMATIVE DEFENSES.

In an action against a railroad company in charge of the director general for damage to property by fire, the defense that the railroad company had committed no negligent act, and that any negligent acts proven were the negligent acts of the agents of the director general was not an affirmative defense under section 2 of Circuit Court Rule No. 23, nor would such defense be likely to take plaintiff by surprise.

4. EVIDENCE—JUDICIAL NOTICE OF ACTS OF CONGRESS.

The courts of this State take judicial notice of the acts of Congress, and the proclamations of the President.

5. APPEAL AND ERROR—AMENDMENT OF PLEADING—SUBSTITUTING DIRECTOR GENERAL FOR RAILROAD COMPANY ON ERROR.

Where the director general of railroads, by general order, ordered that all actions at law for loss and damage to property arising under government control should be brought against the director general, and also gave his consent to amendments substituting the director general for the railroad company, and dismissing the company from the action, he cannot be heard to complain if the Supreme Court, under the broad power conferred by the statute of amendments (3 Comp. Laws 1915, § 12478) permits such amendment in this court, and affirms the judgment in favor of plaintiff; there being no defense upon the merits.

On liability of railroad company for injuries caused by another company using road under lease, license or other contract, see note in L. R. A. 1918E, 260.

Error to Shiawassee; Collins (Joseph H.), J. Submitted October 24, 1919. (Docket No. 18.) Decided December 23, 1919.

Case by Carrie E. Peacock, administratrix of the estate of Frank Peacock, deceased, and personally against the Detroit, Grand Haven & Milwaukee Railway Company for damage to fruit trees by fire. Judgment for plaintiff. Defendant brings error. Order entered substituting the director general of railroads for defendant railway, and judgment affirmed.

Harrison Geer (*W. K. Williams*, of counsel), for appellant.

Miner & Miner, for appellees.

FELLOWS, J. By the act of August 29, 1916, entitled: "An act making appropriations for the support of the army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," the congress of the United States, among other things, enacted (39 U. S. Stat. p. 645):

"The President, in time of war, is empowered, through the secretary of war, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

On December 26, 1917, this country was at war with Germany and with Austria. On that date the President issued a proclamation (40 U. S. Stat. p. 1733). It is not necessary to quote it in full; but in it the President did—

"Take possession and assume control at 12 o'clock noon, on the 28th day of December, 1917, of each and every system of transportation and the appurtenances thereof, located wholly or in part within the boundaries of the continental United States and consisting of railroads and owned or controlled systems of coast-wise and inland transportation engaged in general transportation, whether operated by steam or by electric power." * * *

And by the proclamation the President directed that the possession, control, operation and utilization of such transportation systems should be exercised by and through William G. McAdoo therein appointed and designated as "director general of railroads"; and such director general of railroads was authorized to control and operate such systems through the officers and employees thereof.

On March 21, 1918, the congress by an act entitled "An act to provide for the operation of transportation systems while under Federal control, for just compensation of the owners, and for other purposes" (40 U. S. Stat. p. 451 *et seq.*), after reciting that the President had in time of war taken possession, use, control and operation of the transportation systems, made quite comprehensive provisions with reference to such Federal control. So far as important here, the act provided for the execution of agreements for compensation to the owners while under Federal control, provided for control and compensation in the absence of agreements, declared the money and property derived from operating the systems to be the property of the United States, appropriated the sum of \$500,000,000 for a revolving fund for the purpose of paying the expenses of Federal control. Among the provisions in section 10 of the act is the following:

"Actions at law or suits in equity may be brought by and against such carriers and judgments rendered

as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal government. * * * But no process, mesne or final, shall be levied against any property under such Federal control."

Considering the Federal control over the transportation systems of the country, the Supreme Court of the United States speaking through the Chief Justice in the case of *Northern Pacific R. Co. v. North Dakota*, 250 U. S. 135 (39 Sup. Ct. Rep. 502), said:

"No elaboration could make clearer than do the act of congress of 1916, the proclamation of the President exerting the powers given, and the act of 1918, dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question. But if it be conceded that, despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came, and all the other duties and exactions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing?"

On October 28, 1918, the then director general of railroads promulgated what is known as "General Order No. 50." In it we find the following:

"It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court, based on contract, binding upon the director general of railroads, claim for death or

injury to person, or for loss and damage to property arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the director general of railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, director general of railroads, and not otherwise; * * *

"The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the director general of railroads for the carrier company as party defendant and dismissing the company therefrom."

The plaintiffs own land adjoining the right of way of the Detroit, Grand Haven & Milwaukee Railway Company. Upon this land they had a considerable number of fruit trees. On March 22, 1918, and while said railroad property was under Federal control, sparks from a passing locomotive set fire to the grass either on the right of way or on plaintiffs' land; the fire spread, killing a large number of fruit trees and damaging others. On June 1st, this action was commenced by declaration against the railway company to recover for such damages. To the declaration the defendant pleaded the general issue. At the opening of the trial counsel for the defendant offered that the proceedings might be amended by making the director general of railroads defendant, stating that he would not ask for a continuance if the amendment was made, but did object to proceeding further against the railway company, and insisted that the wrong defendant was named. By appropriate motions and requests the objection to a recovery against the railway company was properly raised. Considering the act itself, what

is disclosed by this record, and what occurred at the argument, it substantially appears that the attorney who tried the case was the attorney for both the railway company and the director general of railroads. No claim is made that the service of the declaration was defective or that it was not made on the proper agent of the director general of railroads. The objections made were overruled and the case proceeded as instituted, resulting in a verdict and judgment against the railway company.

The arguments revolve around the construction and validity of the act of congress. On the part of the plaintiff, it is urged that the term "such carriers" found in section 10 of the act of March 21, 1918, has reference to the corporation owning the railroad, while defendant's counsel insists that it has reference to the director general of railroads. The statute has been considered by several courts, and a comparison of the decisions, and the various constructions urged as the proper one are of interest. Among the cases are *Johnson v. McAdoo*, 257 Fed. 757; *Jensen v. Railroad Co.*, 255 Fed. 795; *Postal Telegraph-Cable Co. v. Call* (C. C. A.), 255 Fed. 850; *Bryant v. Pullman Co.*, 188 App. Div. 311 (177 N. Y. Supp. 488); *McGregor v. Railway Co.* (N. Dak.), 172 N. W. 841; *Lavalle v. Railway Co.* (Minn.), 172 N. W. 918; *Gowan v. McAdoo* (Minn.), 173 N. W. 440; *Rutherford v. Railroad Co.*, 254 Fed. 880; *Schumacher v. Railroad Co.*, 175 N. Y. Supp. 84; *Hatcher & Snyder v. Railway Co.*, 258 Fed. 952; *Mardis v. Hines*, 258 Fed. 945; *Castle v. Railway Co.* (S. C.), 99 S. E. 846; *Vaughn v. State* (Ala. App.), 81 South. 417; *Haubert v. Railroad Co.*, 259 Fed. 361. Other constructions than those suggested by counsel in the instant case have been suggested or may be indulged in. It is possible that congress thought to preserve to persons having causes of action antedating government control the right to proceed against the

corporation during government control, or to expressly preserve the right to proceed against the corporation for its own acts which occurred or accrued during government control, and at the same time preserve the railroad property from seizure or process. But in the disposition we propose to make of the case, we find it unnecessary to devote time or space to a consideration or discussion of the legislative intent.

Whatever the holding elsewhere, it is the settled law of this jurisdiction that a railroad company which has leased its property to another is not liable for the negligent acts of such other, that the recovery should be had against the company by whose negligent acts the damage was done. *Ackerman v. Railroad Co.*, 143 Mich. 58 (8 Ann. Cas. 118). While this record does not disclose whether or not a lease was entered into between the company and the government, it is unimportant so far as the rights of the parties to this litigation are concerned. By the act of congress compensation was to be paid by the government to the railroad company whether a lease was executed or not. The relations were either technically those of lessor and lessee or analogous thereto.

The defense of the railroad company that it had committed no negligent act resulting in damage to the plaintiff, that any negligent acts proven were the negligent acts of the agents of the director general of railroads, was not an affirmative defense under section 2 of Circuit Court Rule No. 23, nor would such defense be likely to take the plaintiff by surprise. The courts of this State take judicial notice of the acts of congress. *McMorran Milling Co. v. C. H. Little Co.*, 201 Mich. 301; and of the proclamations of the President. *Jenkins v. Collard*, 145 U. S. 546 (12 Sup. Ct. Rep. 868).

But the director general of railroads by General Order No. 50 has ordered that "actions at law * * *

for loss and damage to property arising since December 31, 1917, * * * shall be brought against William G. McAdoo, director general of railroads, and not otherwise," and by the same order has given his consent to amendments substituting the director general for the company and dismissing the railroad company from the action. We do not determine the validity or the propriety of an administrative order directing the method of procedure in the courts of the various States. What we do determine is that the director general of railroads cannot be heard to complain if this court, under the broad power conferred upon it by the statute of amendments, permits such amendment here. It is not pointed out that any defense was, or is, available to the director general of railroads upon the merits that was not permitted in the trial court. Indeed, there appears to have been no defense made on the question of negligence; that the locomotive set the fire resulting in the destruction of some of plaintiffs' fruit trees appears not to have been disputed; the amount of such damage was in dispute. The case was tried by the attorney for the director general of railroads; when the trial began he suggested that the amendments be then made as provided by General Order No. 50, and stated that it might be made without a continuance. Section 12478, 3 Comp. Laws 1915, provides:

"The court in which any action or proceeding shall be pending, shall have power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment or decree rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings, which do not affect the substantial rights of the parties."

An order will be here entered substituting the di-

rector general of railroads for the railway company and dismissing the case as to the railway company. Upon the entry of such order the judgment will be affirmed. The railway company will recover its costs to be taxed.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

WILSON v. DETROIT UNITED RAILWAY.

1. DAMAGES—PERSONAL INJURIES—PERMANENT INJURIES—RENDERING PLAINTIFF INCAPABLE OF EARNING—EXCESSIVE VERDICT.

Where plaintiff, 39 years of age, earning \$91 a month at the time of the injury sued on, was rendered permanently unfit as a wage earner, and the evidence shows that between the time of the injury and the trial he had lost \$2,500 in earnings and that he had suffered greatly during this period, it cannot be said that a verdict for \$6,000 is so grossly excessive that of itself it shows prejudice, passion, or partiality on the part of the jury.

2. APPEAL AND ERROR—EXCESSIVE VERDICT.

The Supreme Court may not, on error, set aside a verdict as excessive by substituting its judgment for that of the jury.

3. TRIAL—CONDUCT OF COUNSEL—EVIDENCE—HARMLESS ERROR.

Where plaintiff's counsel asked him if he had any children, stating that the question was asked in view of defendant's claim that he had chronic venereal disease, and the court declined to receive the answer, *held*, not error, where there is nothing to indicate that counsel did not act in

On excessiveness of verdicts in actions for personal injuries other than death generally, see comprehensive note in L. R. A. 1915F, 30.

good faith, and the fact that plaintiff had children had already been testified to without objection.

4. SAME—INSTRUCTIONS—QUESTION FOR JURY.

Where clinical reports of a hospital giving certain data of plaintiff's physical condition were received in evidence, and the person making such entries was not called as a witness, but the senior surgeon who signed them testified that while some of the facts stated therein were within his personal knowledge, others were not, and on cross-examination stated that "clinical records are not infallible by a long ways; they are frequently wrong, I will say," and many of the facts found in said reports were denied by plaintiff, the trial court was not in error in instructing the jury: "As to these hospital records, they have been received in evidence in this case. Their probative effect, that is, how much of them you believe, or how much of them you disbelieve, is left solely as a question for your determination."

Error to Wayne; Hunt (Ormond F.), J. Submitted October 10, 1919. (Docket No. 29.) Decided December 23, 1919.

Case by Walter Wilson against the Detroit United Railway for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Corliss, Leete & Moody and *A. B. Hall*, for appellant.

Wurzer & Wurzer, for appellee.

FELLOWS, J. Plaintiff brings this action to recover damages for personal injuries received in a collision between the car in which he was a passenger and another street car in the city of Detroit. He had verdict and judgment for \$6,000. Liability of defendant and absence of contributory negligence of plaintiff are not denied. The principal contention of defendant is that the trial judge was in error in refusing a new trial sought on the ground that the verdict is excessive.

The accident occurred October 21, 1916. Plaintiff was then 39 years old. For a number of years he had been mate on the boat "Anona" owned by Mrs. T. D. Buhl. About nine months before the accident he left that position and went to work in a building owned by Mrs. Buhl where he ran the elevator and did some janitor work. He was earning at the time of the accident \$91 per month. He had received a fall while at work on the boat and defendant claims the injuries then received, together with other physical ailments, necessitated his retirement from that service and caused his present condition; that he was given light employment by Mrs. Buhl, but that he then had a tubercular knee which rendered him unfit for hard labor, and that plaintiff's present condition is but the result of a progressive disease for which it is not liable; that prior to the street car accident plaintiff was obliged to use crutches and had them with him when injured. Plaintiff, on the other hand, insists that neither the fall nor his physical condition caused the change of work; that, while he was afflicted at times with rheumatism and on occasion used his crutches, he was able to work; that the street car accident caused his present condition and particular stress was made that the accident aggravated and accelerated any diseased condition then existing.

A careful examination of this record convinces us that the overwhelming weight of the evidence establishes that plaintiff had a tubercular knee at the time of the accident and had been treated for it at different times; that the disease is a progressive one, which might be retarded for a number of years, but which sooner or later was liable to develop with serious results and was not curable. The undisputed testimony shows that at the time plaintiff was examined by the physicians he had a hernia, undoubtedly of some years standing; such examination also disclosed that there

had been three incisions in the scrotum. Hospital records offered by defendant tended to show that he had at one time been afflicted with gonorrhea which defendant claimed was chronic. The testimony of the tenants in the building where plaintiff worked is quite convincing that he was able to do his work up to the time of the accident. The testimony tends strongly to establish that after the accident the tubercular condition developed, the hip bone became involved, the muscles atrophied, the joints ankylosed; his weight decreased from about 140 pounds to 111 pounds; that he suffered much pain, his disability is permanent, and that he is wholly unfit to further perform manual labor.

The testimony shows that there were some immediate effects of the accident, the plaintiff was rendered unconscious, was taken to a hospital where he remained some seven weeks, his knee was put in a cast and weights were applied to his limb; but in the main the aggravation of existing conditions was most strongly pressed and the verdict no doubt is largely based on that feature of the case.

May we say upon this state of facts that the trial judge who heard all the testimony, saw the plaintiff, and was in much more advantageous position to pass upon the question, erred in holding that the verdict was not so excessive for the injuries resulting from this accident as to warrant the granting of a new trial on this ground? While the testimony is convincing to us that the plaintiff had been treated for tuberculosis of the knee prior to the accident, there was reliable testimony given upon the trial that it was of a "slow type," "latent," that plaintiff had "a little tuberculosis which possibly would never have bothered him," and that an injury "would wake up the tuberculosis," cause it to develop and spread to the hip,

and produce the condition the testimony disclosed plaintiff was in at the time of the trial.

If this plaintiff at the time of the accident, notwithstanding his physical condition, was able to discharge the duties connected with his employment and earn \$91 per month, and by reason of the accident has been rendered permanently unfit to longer continue as a wage earner, and a latent or slow case of tuberculosis was caused to be developed into an active one, thus shortening his life and depriving him during the remainder thereof of his earning power, then plaintiff was entitled upon this record to a verdict in some amount. There was sufficient evidence in the case to warrant the jury in finding such to be the situation and to award him a verdict. May this court say, having due regard for the functions of the jury, that the amount awarded was so excessive as to require its vacation? The trial occurred upwards of two years and three months after the accident. Plaintiff's earnings during the period intervening at his then wage would have approximated \$2,500. He had suffered greatly during this period, and it cannot be doubted upon this record that his ability to work is at an end. In the recent case of *Fishleigh v. Railway*, 205 Mich. 145, we fully discussed the question of excessive verdicts, and, therefore, need not go over the ground again. The functions of the jury, the trial judge and the appellate court are well understood. We have searched this record in vain to find appeals to prejudice, passion or partiality that would justify us in saying that the verdict was the result of anything other than the evidence in the case; nor can we say that the verdict is so grossly excessive that of itself it shows prejudice, passion or partiality on the part of the jury. We could only set this verdict aside by substituting our judgment for that of the jury. This, under the repeated decisions of this court, we may not do.

We have examined the other errors assigned and are unable to discover reversible error in any of them. But two of them will be considered. Plaintiff was asked by his counsel the question, "Have you any children?" This was objected to and plaintiff's counsel stated in substance that it was asked in view of the claim of defendant that plaintiff had a chronic venereal disease; that he desired to show that plaintiff had children. The court declined to receive the testimony. The incident is assigned as error, and *McKormick v. City of West Bay City*, 110 Mich. 265; *Rickabus v. Gott*, 51 Mich. 227; *Phillips v. Benevolent Society*, 120 Mich. 142, and *Martin v. Fisher*, 143 Mich. 462, are cited. There is nothing in this record indicating that plaintiff's counsel did not act in good faith in asking the question and in stating the purpose for which he asked it; but beyond that it had already appeared from the testimony of plaintiff's family physician without objection that plaintiff had children.

Defendant introduced several clinical reports of the Marine Hospital giving a record, history, treatment, and other data of plaintiff's physical condition at times before and after the accident. The plaintiff denied many of the facts found in these reports, including in his denial the fact of treatment at the hospital at the times stated before the accident. The person who made the entries in these reports was not called as a witness but the senior surgeon, who signed them, was. While some of the facts stated in the reports were within his personal knowledge, others were not. In answer to a question asked on cross-examination, he stated:

"Clinical records are not infallible by a long ways; they are frequently wrong, I will say."

The trial judge in his charge to the jury said:

"As to those hospital records, they have been received in evidence in this case. Their probative effect,

that is, how much of them you believe, or how much of them you disbelieve, is left solely as a question for your determination."

This is assigned as error. We think in view of the testimony above quoted this instruction was justified.

Finding no reversible error, the judgment is affirmed.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

O'CONNOR v. SCALLEN.

UNION TRUST CO. v. O'CONNOR.

JOINT ADVENTURES—EVIDENCE—SUFFICIENCY.

Where plaintiff real estate employee had obtained an option on 30 acres of land in his own name, and, being unable to finance same, sold a one-half interest to his employer, who negotiated a sale thereof to a real estate company and was by it appointed a sales manager, plaintiff's claim against his former employer that he was to receive a share of the profits realized as commissions on sales, *held*, not sustained by a preponderance of the evidence.

Appeal from Wayne; Dingeman (Harry J.), J. Submitted October 21, 1919. (Docket No. 87.) Decided December 23, 1919.

Bill by A. Louis O'Connor against John P. Scallen, executor of the last will of John A. O'Brien, deceased,

and others for an accounting. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Oxtoby & Wilkinson and McKee Robinson, for plaintiff.

McNamara & Scallen and Fred Dye, for defendant estate.

FELLOWS, J. By a stipulation filed in this court since the record was printed and filed, we are advised that the matters involved in the various appeals other than the one having reference to the disposition to be made of the controversy between the plaintiff, Mr. O'Connor, and the O'Brien estate have been adjusted and need not be considered by this court. Only such facts, therefore, need be stated as bear upon this branch of the case, and our discussion and consideration of this controversy alone will dispose of the case. Mr. O'Brien died after decree in the court below and the suit was revived in the name of the executor of his estate.

In April, 1915, and for some two or three years prior thereto the plaintiff, Mr. O'Connor, was in the employ of John A. O'Brien, a real estate dealer of the city of Detroit, who specialized in acting as general agent of subdivision properties. In that month plaintiff obtained from one Wandke and wife in his own name and by payment of \$200 of his own money an option to purchase 30 acres of land located near Detroit and available for platting purposes. The purchase price was \$30,000; \$9,800 was to be paid by October 1, 1915, and the balance in deferred payments. It is the claim of the plaintiff that he had decided to quit Mr. O'Brien's employ; that he obtained this option and had an opportunity to become associated with another dealer, also having an option on unplatted property; that he informed Mr. O'Brien of his inten-

tion to leave and of his option, and as a result of some talk, it was agreed between them that Mr. O'Brien should pay him one-half the amount he had invested in the option; that the option should be disposed of to a real estate company in which Mr. O'Brien was interested or to a new company to be organized; that they should each raise their proportionate share of the money to make the first payment; that each was to receive one-half of what it was sold for; that a sales contract should be procured from the company taking the option with Mr. O'Brien to put the property on the market; that the commission on the sales, after paying expenses, was to be divided, one-third to Mr. O'Connor and two-thirds to Mr. O'Brien; he insists that these agreements of Mr. O'Brien were a part of the consideration for the transfer of the option; that he has fulfilled all of the obligations he was to perform and is entitled to an accounting. Mr. O'Brien denied that any such arrangement was made. He testified that Mr. O'Connor and he had talked about Mr. O'Connor getting the option before it was secured; that when Mr. O'Connor had obtained it he was without means or financial connections sufficient to make the payment of \$10,000, and could not float the enterprise; that Mr. O'Connor never intimated that he was going to leave his employ and handle the option himself, but did ask him to come in on it, and that he made an outright purchase of a one-half interest in the option for \$100 and he exhibits a receipt signed by Mr. O'Connor for this amount reciting that it is "payment in full for one-half interest (undivided) on option held by me on Wandke piece of 30 acres, Hamtramck." He also exhibits the check given for the payment. It should be stated that the receipt and the check are the only written evidence of the dealings of the parties.

Mr. O'Brien was largely interested in, and the presi-

dent of, the defendant O'Brien-Dores Development Company. Mr. O'Connor had a small amount of stock in the company and was its secretary. This company had been the owner of, and had put several subdivisions on the market. In each instance, Mr. O'Brien had acted as its sales agent in disposing of the lots. The option on the Wandke property was sold to the O'Brien-Dores Development Company for \$15,000 of its stock. The directors' meeting at which the option was purchased was held June 8th. The option had been assigned to one Lawton, a friend of Mr. O'Connor, and the same was purchased by the company from him and the stock issued to him. He, in turn, surrendered his certificate and \$7,500 of the stock was issued to O'Connor and a like amount to O'Brien. At the same meeting a sales contract was authorized with O'Brien. Both O'Connor and O'Brien voted to purchase the option from Lawton, but O'Brien did not vote on the question of the sales contract. On August 9th the board of directors of the company authorized the borrowing of \$10,000 to make the first payment on the Wandke property and the payment of a bonus if necessary to secure the loan. Both parties seem to have voted for this action. The property was put on the market as the Fordham subdivision. Mr. O'Brien employed a Mr. Harrison as sales manager to handle the subdivision. The lots were all sold. Shortly thereafter, and in March, 1916, both Mr. O'Connor and Mr. Harrison left the employ of Mr. O'Brien and formed a partnership. February 2, 1917, this bill was filed. From a decree dismissing it on the merits after a hearing this appeal was taken.

We agree with the result reached by the trial judge and will proceed to state some of the reasons which impel us to this conclusion. What the agreement was between the parties was known only to these two men. As to what it was we have the testimony of the one

against the testimony of the other. Defendant insists that there was nothing beyond the purchase of a half interest in the option; that the payment of \$100 was all the consideration agreed upon. Plaintiff insists that there were further considerations. The receipt, executed nearly two years before this case was started, recites that the hundred dollars was "payment in full for one-half interest" in the Wandke option. While a receipt may not be conclusive upon the parties as a matter of law, in the instant case it is quite persuasive of defendant's claim. Beyond this is the situation of the parties. Plaintiff had an option to purchase this property, for which he had paid \$200, but he was required to pay the balance of the down payment of \$10,000 (\$9,800) in a few months; unless that payment was made the option would expire and be valueless. He was not in position to make the payment; defendant through his connections was. The stock of the O'Brien-Dores Development Company was then worth par and was at the time of the trial worth much more. Mr. O'Brien's check to plaintiff for the hundred dollars, which he claims was the full consideration for the half interest in the option, is dated June 5th. Three days later, plaintiff and Mr. O'Brien received stock of the value of \$15,000 for the option, \$7,500 of which went to Mr. O'Connor. It seems to us quite doubtful that this employee, with the immediate prospect of \$7,500 for his hundred-dollar investment, haggled with his employer for a greater profit.

Mr. O'Brien was the president of the O'Brien-Dores Development Company, and the holder of a substantial amount of its stock. He had been sales agent for all the subdivisions the company had put on the market. There is nothing in the record intimating that the company was dissatisfied with his past services. When the matter of selecting a sales agent came up at the directors' meeting he left the room. Plaintiff

claims that Mr. O'Brien left the matter of making this arrangement in his hands. Mr. O'Brien denies this. It should be stated at this point that we have been particularly struck, in reading plaintiff's testimony, with the marked magnifying of the effect of his efforts and the marked minimizing of the effect of the efforts of others in making a success of each detail in working out this transaction. It is plaintiff's claim that at this directors' meeting he succeeded in overcoming objections of other directors and succeeded in securing a sales contract that was more advantageous to Mr. O'Brien than to the company, and he urges that this is evidence that he had a personal interest in the sales contract with Mr. O'Brien, and that his action, while sitting on the board of directors of this corporation, was to further that personal interest. What we may think of this claim viewed in the light of public policy is unimportant, but it gives us a sidelight on plaintiff's mental processes and his moral viewpoint that has been quite helpful in reaching a conclusion in this case as to where the truth rests.

It is alleged in the bill that a part of the arrangement between plaintiff and Mr. O'Brien was that they were each to raise one-half of the funds necessary to finance the transaction and that plaintiff, to carry out his part of the bargain, sold sufficient stock to cover his half but that O'Brien took the proceeds of such sales and used his own stock instead of treasury stock in filling the sales. The answer denies this arrangement. Mr. O'Brien says he sold some of his stock, that the sales were made by one Holz to whom he paid a commission. It is claimed by plaintiff that he raised his half of the necessary funds by these sales of stock, but that by reason of O'Brien's substituting his stock for company stock, and O'Brien's failure to sell enough stock to make up his share the company was obliged to borrow money and pay a large bonus. But the rec-

ord discloses that the arrangement for borrowing the money and paying the bonus was made at a meeting of the board of directors at which plaintiff was present on August 9th, while all of the stock that was sold except seven shares was sold after that date and some of it months afterwards, and plaintiff admitted in his testimony that most of the sales were made by Mr. Holz, although he claims to have assisted. Nor was there introduced in evidence the record of any meeting of the directors of the company authorizing the issuance of any treasury stock except that issued for the option.

We are not persuaded that Mr. O'Brien's affidavit filed in other litigation, when properly analyzed, stamps him, as plaintiff claims, as a man unworthy of belief. His testimony in the instant case was taken by deposition shortly before he left for France where he met his death. A reading of his testimony shows a straightforwardness in his answers and convinces one of his truthfulness.

We cannot without making this opinion unnecessarily prolix point out further circumstances detailed in the record which, together with those here detailed, convince us that the plaintiff has failed to establish the claim he now asserts by a preponderance of the proof. We have read this record with care. From it we conclude that plaintiff has not sustained the burden cast upon him by the law to establish his case by evidence and circumstances which outweigh the evidence and circumstances against it. In this conclusion, we are fortified by the fact that the trial judge, who heard the testimony and who saw the plaintiff upon the stand, reached the same conclusion.

The decree of the court below will be affirmed. with costs to the appellee.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

ANDERSON v. CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY CO.

1. COMMERCE—INTERSTATE COMMERCE—ADMINISTRATIVE QUESTIONS
—JURISDICTION OF COURTS.

Under the act of congress of February 4, 1887, creating the interstate commerce commission, and amendments (24 U. S. Stat. p. 379 *et seq.*), where questions in interstate commerce arising between shipper and carrier are administrative in character, unless they are first submitted to the interstate commerce commission the courts are without jurisdiction to afford relief.

2. SAME—DAMAGES FOR FAILURE TO FURNISH CARS—JURISDICTION
OF STATE COURTS.

The question of a railroad's failure to furnish a shipper with sufficient cars for interstate shipments was not one of an administrative character, requiring submission of same to the interstate commerce commission before beginning action therefor in the State court; the Hepburn act amending the interstate commerce act (34 U. S. Stat. p. 584), requiring the carrier to furnish sufficient cars, being but declaratory of the common law.

3. SAME—UNJUST DISCRIMINATION—RULE OF CARRIER—JURISDICTION
OF STATE COURTS.

In an action for failure to furnish sufficient cars for interstate shipments, where unjust discrimination is alleged, if such distribution has been made pursuant to a rule of the carrier and in conformity with it, the shipper must first proceed before the interstate commerce commission to establish the discriminatory character of the rule; but if the discrimination was caused by a breach of the rule and resulted from its nonobservance, then the State courts have immediate jurisdiction.

4. CARRIERS—FAILURE TO FURNISH SUFFICIENT CARS—EVIDENCE—
SUFFICIENCY.

In an action against a carrier for failure to furnish sufficient cars to meet plaintiff's normal demands, testimony held, to make a case for plaintiff.

5. SAME—DUTY TO FURNISH CARS NOT MEASURED BY SUDDEN DEMAND.

If the great demand to furnish cars was sudden, and one the carrier would have no reason to apprehend, and it could not have been reasonably expected, the individual shipper could not insist as an absolute right upon having his requisitions filled.¹

6. SAME—DISTRIBUTION OF CARS—DISCRIMINATION.

In case of car shortage it is the duty of the carrier to allot the cars so as to prevent unjust discrimination.

7. SAME—METHOD OF DISTRIBUTION—ADOPTION OF RULE.

Leaving the distribution of cars, in case of a shortage, to the discretion of an officer of the carrier company would not be the adoption of a rule, but if such officer provided a rule of distribution, the rule would be the rule of the company.

8. SAME—ADOPTION OF RULE—EVIDENCE—SUFFICIENCY.

Evidence, *held*, sufficient to justify the conclusion by the jury that a rule for the distribution of cars was adopted by the carrier.

9. SAME—UNJUST DISCRIMINATION—QUESTION FOR JURY.

Evidence that plaintiff was unjustly discriminated against in the nonenforcement of the rule, *held*, sufficient to raise a question for the jury.

10. SAME—TRIAL—DISCRIMINATION—INSTRUCTIONS.

The trial judge was in error in instructing the jury that plaintiff could recover if there was discrimination in fact, taking no account of the question of the adoption of a rule.

11. SAME—DUTY TO FURNISH CARS FOR SEASONAL COMMODITIES.

A carrier's duty to furnish sufficient cars to meet the normal demand of the trade is not to be estimated by the number of cars needed when the normal demand is least, but by the number when the normal demand is heaviest, in respect to a seasonal commodity, such as logs.

12. SAME—DUTY TO ANTICIPATE SEASONAL DEMANDS.

The carrier is bound to know that at certain seasons of the year there will be movements of certain seasonal commodities, and is bound to anticipate and provide for such demand.

¹On the question of duty of carrier to furnish cars to shipper, see notes in 8 L. R. A. (N. S.) 108, and 44 L. R. A. (N. S.) 643.

Error to Ontonagon; Driscoll (George O.), J. Submitted October 29, 1919. (Docket No. 25.) Decided December 23, 1919. Rehearing denied April 10, 1920.

Case by Robert E. Anderson against the Chicago, Milwaukee & St. Paul Railway Company for failure to furnish cars for the transportation of logs. Judgment for plaintiff. Defendant brings error. Reversed.

Leigh C. Caswell and *Arthur H. Brown* (*J. N. Davis*, of counsel), for appellant.

Van Slyck & Walsh, for appellee.

FELLOWS, J. Plaintiff is a logger and in 1916 and 1917 owned timber lands near a branch of defendant's railroad called in the record the "White Pine Branch" and the "White Pine Extension." Intending to operate during the winter season on this property he made known to defendant's agent his requirement for cars during the season. It is his claim that the cars were not furnished in the number requested and needed; that he was required to bank a large number of his logs, many were left on the ground and were rendered valueless, and that by reason of the failure of the defendant to furnish him cars he has suffered damage for the recovery of which this action was brought. He counts in his declaration on the failure of defendant to furnish the cars and upon unjust discrimination of the defendant in apportioning cars among the shippers in that locality. Such further detail as may be necessary to a full understanding of the case will be stated as we proceed.

Plaintiff's shipments were interstate. By appropriate objections at the beginning of the trial and motions for a directed verdict defendant raised the question of jurisdiction of the court to hear and determine the controversy. As this question challenges the juris-

diction of the court over the subject-matter and is the important question in the case and the one upon which defendant and appellant lays greatest stress, we shall consider it first. We note, but disagree with plaintiff's contention that it is not properly raised. It is insisted by the defendant that the questions here involved are administrative ones and the shipments being interstate shipments such questions are to be first submitted to, and determined by the interstate commerce commission created by the act of congress under the commerce clause of the Federal Constitution. It is insisted that such commission has jurisdiction to the exclusion of the State courts when the questions are administrative in character, and that the questions here sought to be litigated are of that character.

The power of congress to regulate interstate commerce is beyond question. Has it by the legislation regulating such commerce withdrawn or attempted to withdraw from the State courts jurisdiction to adjudicate such controversies as are here involved? Has it committed to the interstate commerce commission the determination of such controversies as here presented? Are the questions here involved of an administrative character to be solved only by an administrative board? These are the questions which present themselves at the threshold of this inquiry, and to them we must first address ourselves.

By the act of February 4, 1887, entitled, "An act to regulate commerce" (24 U. S. Stat. p. 379), the interstate commerce commission was created. By this act and amendments to it (see 25 U. S. Stat. p. 855; 28 U. S. Stat. p. 643; 32 U. S. Stat. p. 847; 34 U. S. Stat. p. 584), comprehensive provisions have been enacted in the regulation of interstate commerce and broad powers have been conferred upon the commission, powers of an administrative and *quasi-judicial* character. In the original act, and it has continued

without amendment, by section 22 it is, among other things, provided:

"And nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

In the leading case of *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075), the court had before it for review the decision of the court of last resort of Texas on the question. The Abilene company had brought suit in the State court against the railway company, alleging that the railway company had exacted an unjust and unreasonable rate for certain interstate shipments; there was also an allegation that the rate exacted was discriminatory. The railway company defended principally on the ground that the State court was without jurisdiction, that the interstate commerce commission must be first applied to, as the questions involved had been committed to that body by the act to regulate commerce. A judgment for the oil company in the trial court had been affirmed by the court of civil appeals. In an exhaustive opinion by the present Chief Justice, then Mr. Justice White, the legislation and authorities were reviewed and the functions of the commission and of the courts and the jurisdiction of both were fully considered, and it was held that the courts were without jurisdiction where the character of the question was as there involved until after the commission had acted; that the questions were administrative, the rate-making power was not in the judiciary, and that congress acting within its power had committed the determination of such administrative questions to an administrative body to the exclusion of the courts, and the judgment was reversed. This case was followed, and the reasoning of the opinion applied and extended in the later decisions of that court. Among

others see *Robinson v. Railroad Co.*, 222 U. S. 506 (32 Sup. Ct. Rep. 114); *Baltimore & Ohio R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481 (30 Sup. Ct. Rep. 164); *Loomis v. Railroad Co.*, 240 U. S. 43 (36 Sup. Ct. Rep. 228); *Northern Pacific R. Co. v. Solum*, 247 U. S. 477 (38 Sup. Ct. Rep. 550); *Pennsylvania R. Co. v. International Coal Co.*, 230 U. S. 184 (33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315); *Mitchell Coal & Coke Co. v. Railroad Co.*, 230 U. S. 247 (33 Sup. Ct. Rep. 916); *Morrisdale Coal Co. v. Railroad Co.*, 230 U. S. 304 (33 Sup. Ct. Rep. 938). We have stated that the doctrine of the *Abilene Case* had been extended. In the case of *Mitchell Coal & Coke Co. v. Railroad Co.*, *supra*, Mr. Justice Pitney in an exhaustive dissenting opinion insisted that it had been extended too far, that it had nullified certain of the provisions of the act itself. But the cases cited and others which might be added must be taken as laying down the rule that where the questions are administrative in character they must be first submitted to the interstate commerce commission, and that unless first submitted to such commission the courts are without jurisdiction to afford relief.

This naturally leads us to consider whether the questions here involved are administrative in character such as to preclude the State court from inquiring into and adjudicating them without application having been first made to the commission. And first as to the failure to furnish sufficient cars. By the Hepburn act (34 U. S. Stat. p. 584), an amendatory act to the act of 1887, it is provided:

"And it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

This was but declaratory of the common law. In the case of *Pennsylvania R. Co. v. Sonman Coal Co.*,

242 U. S. 120 (37 Sup. Ct. Rep. 46), the court had before it for review a decision of the supreme court of the State of Pennsylvania. The coal company had brought suit in the State court to recover against the railroad company for damages claimed to have been occasioned by the failure of the railroad company to furnish cars and for unjust discrimination; upon the trial the claim of unjust discrimination was abandoned, leaving only the question of failure to furnish cars as the basis of recovery; a judgment for \$145,830.25 had been affirmed by the supreme court of the State (241 Pa. St. 487, 88 Atl. 746). The contention there made was the same as here made, that the State court was without jurisdiction, that the questions were administrative in character and must first be submitted to the interstate commerce commission. Mr. Justice Van Devanter, speaking for the court after citing authorities, said:

"Applying these rulings to the case in hand, we are of opinion that a State court could entertain the action consistently with the interstate commerce act. Not only does the provision in section 22 make strongly for this conclusion, but a survey of the scheme of the act and of what it is intended to accomplish discloses no real support for the opposing view. With the charge of unjust discrimination eliminated, the ground upon which a recovery was sought was that for a period of four years, during which the conditions were normal, the carrier had failed upon reasonable demand to supply a shipper in interstate commerce a sufficient number of cars to transport the output of the latter's coal mine. Assuming that the conditions were normal and the demand reasonable, it was the duty of the carrier to have furnished the cars. That duty arose from the common law up to the date of the amendatory statute of 1906, known as the Hepburn act, and thereafter from a provision in that act which, for present purposes, may be regarded as merely adopting the common-law rule. There was evidence tending to show, and the jury found, that the conditions in the coal

trade were normal and the demand for the cars reasonable. Indeed, without objection from the carrier, the court said when charging the jury: "There is no testimony disputing the claim of the plaintiff that these were normal times." The carrier insisted and the jury found that the carrier had a generally ample car supply for the needs of the coal traffic under normal conditions, and the jury further found that the failure to furnish the cars demanded was without justifiable excuse. Thus far it is apparent that no administrative question was involved—nothing which the act intends shall be passed upon by the commission either to the exclusion of the courts or as a necessary condition to judicial action.

"But there was testimony tending to show that the carrier was applying or following a rule for allotting cars which did not entitle the coal company to receive as many cars as it needed and requested, and because of this it is contended that the reasonableness of this rule was in issue and was an administrative question which the act intends that the commission shall solve. We cannot accede to the contention. The conditions in the coal trade being normal, as just shown, the number of cars to which the coal company was entitled was to be measured by its reasonable requests based upon its actual needs. It is only in times of car shortage resulting from unusual demands or other abnormal conditions, not reasonably to have been foreseen, that car distribution rules originating with the carrier can be regarded as qualifying or affecting the right of a shipper to demand and receive cars commensurate in number with his needs. *Pennsylvania R. Co. v. Puritan Coal Co.*, 237 U. S. 121, 133. Such a rule being inapplicable in the conditions existing at the time, the rule mentioned in the testimony could not be a factor in the decision of the case, and whether in a time of unforeseen car shortage it would be reasonable or otherwise was not then material."

Let us consider now the question of unjust discrimination. As before, we should turn to the decisions of the court of final resort when Federal questions are involved. In the case of *Pennsylvania R. Co. v. Puritan Coal Co.*, 237 U. S. 121 (35 Sup. Ct. Rep.

484), the court had before it another holding of the supreme court of Pennsylvania (237 Pa. St. 420, 85 Atl. 426, Ann. Cas. 1914B, 37). The coal company had brought an action and recovered a judgment for \$74,323.88 for damages resulting from unjust discrimination. This judgment had been affirmed by the State supreme court. There, as here, the railroad company insisted that the State courts were without jurisdiction. Mr. Justice Lamar, speaking for the court after considering sections 8 and 9 of the act, takes up the provisions of section 22, which we have quoted above, and says:

"But sections 8 and 9 standing alone might have been construed to give the Federal courts exclusive jurisdiction of all suits for damages occasioned by the carrier violating any of the old duties which were preserved and the new obligations which were imposed by the commerce act. And, evidently, for the purpose of preventing such a result, the proviso to section 22 declared that 'nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.'

"That proviso was added at the end of the statute,—not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections,—but to preserve all existing rights which were not inconsistent with those created by the statute. It was also intended to preserve existing remedies, such as those by which a shipper could, in a State court, recover for damages to property while in the hands of the interstate carrier; damages caused by delay in shipment; damages caused by failure to comply with its common law duties and the like. But for this proviso to section 22 it might have been claimed that, congress having entered the field, the whole subject of liability of a carrier to shippers in interstate commerce had been withdrawn from the jurisdiction of the State courts and this clause was added to indicate that the commerce act, in giving rights of action in Federal courts, was not intended to deprive the State courts of their general and concurrent jurisdiction. * * *

"There are several decisions, already cited, which hold that suits against railroads for unjust discrimination in interstate commerce can only be brought in the Federal courts. But it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by congress in the commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the commission has declared the rule to be unjust, redress must be sought before the commission or in the United States courts of competent jurisdiction as provided in section 9.

"But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the State or Federal courts."

Sustaining the views expressed in these cases will be found the following: *Eastern Railway Co. v. Littlefield*, 237 U. S. 140 (35 Sup. Ct. Rep. 489); *Illinois Cent. R. Co. v. Mulberry Coal Co.*, 238 U. S. 275 (35 Sup. Ct. Rep. 760).

The cases clearly and unmistakably lay down the rule that when the action is for damages due to the carrier's failure to furnish cars when reasonably demanded, the shipper may proceed in the State court; that when the action is for damages occasioned by

discrimination practiced by the carrier in the distribution of cars during a period of car shortage and such distribution has been made pursuant to a rule of the carrier and in conformity with it, the shipper must first proceed before the interstate commerce commission to establish the discriminatory character of the rule; but that where the discrimination is caused by a breach of the rule, and the discrimination results from its nonobservance, then the State courts have jurisdiction in an action brought by the shipper to recover damages occasioned by such discrimination.

But counsel for the defendant insist that plaintiff failed to make a case under either of the claims asserted and that the court for this reason should have directed a verdict. This contention requires us to again refer to the facts and to more fully state them. And first as to the failure to furnish cars. The plaintiff testified that he made a seasonable request of the agent of defendant for eight cars daily, and that he was not furnished them. It is not necessary for us to determine whether this proof alone made a *prima facie* case, as he further testified that for several years defendant had been short of cars to meet his demands. In addition to his testimony, the testimony of the superintendent of transportation of defendant is to the effect that in normal years the division in which these logging operations were being conducted required from 1,400 to 1,500 cars for logging purposes, while the superintendent of the division testified that during this season the division had only 500 cars, which number was, during the season, reduced to 450. Clearly a case of failure to furnish cars to meet the normal demands was made by this testimony.

As to discrimination, it was the claim of defendant that there was a shortage of cars adaptable for use in transporting logs during this season due to unforeseen and unprecedented conditions; that heavy

snow storms prevented delivery of cars; that the pre-war demands of the government took a large number of flat cars; that the shortage was country-wide, and that due to weather conditions and unprecedented and unforeseen demands for flat cars a large amount of its equipment became unavailable for logging operations on this division. Manifestly the impossible could not be required of the carrier. If the great demand to furnish cars was sudden and one the carrier would have no reason to apprehend, and it could not have been reasonably expected, the individual shipper could not insist as an absolute right upon having his requisitions filled. As remarked by Mr. Justice Lamar in *Pennsylvania R. Co. v. Puritan Coal Co.*, *supra*:

“The common law of old in requiring the carrier to receive all goods and passengers recognized that ‘if his coach be full’ he was not liable for failing to transport more than he could carry.”

It is equally manifest that in case of car shortage the duty of the carrier is to allot the cars so as to prevent unjust discrimination. We have attempted to make clear that when a car shortage occurs, if the cars are allotted in accordance with a rule adopted by the carrier and it is claimed by the shipper that the rule works a discrimination, the shipper must first have that administrative question settled by the interstate commerce commission, and that no matter how inequitable the rule may be, or how unjustly it may discriminate against the individual shipper, its propriety is to be first submitted to the commission and the administrative question settled by that administrative body before any action may be brought for damages occasioned by its enforcement; but where a rule has been adopted and it is not adhered to and discrimination is worked by a failure to observe the rule, by and in its breach, then no administrative question is involved, but one of fact is presented which

the courts may determine. One of the claims of defendant's counsel is that by leaving the distribution of available cars to the discretion of the chief train dispatcher, the railroad company thereby adopted a rule. But leaving the distribution of cars in case of car shortage to the discretion of an officer of the company is not the adoption of a rule. If such officer provides a rule of distribution under the circumstances, the rule would be the rule of the company; but giving an officer a free hand is not the adoption of a rule. There is something of a conflict in the testimony as to whether there was a rule adopted and what it was; but we think there was evidence which would have justified the jury in finding that a rule was adopted. The chief train dispatcher testified: "We would distribute the cars in the ratio of the available cars to the calls." The jury had the right to conclude from this testimony that this was the rule adopted by the company. Was there evidence that unjust discrimination resulted in nonenforcement of this rule? We think there was. If by the use of the word "calls" this witness intended to convey the impression that the available cars were distributed in the ratio of cars to the requests for cars his own testimony is susceptible of the conclusion that the rule was not observed. There were three logging companies operating in this territory, during at least a portion of the time: The Diamond Lumber Co., Spies-Thompson Co., and Northland Lumber Co. This witness testified that the Diamond Lumber Company never that winter placed a specific order for cars with him. If by the use of the word "calls" this witness intended to convey the impression that the available cars were distributed in the ratio of cars to the demands for cars by reason of the operations of the various loggers and logging companies, then there was conflicting testimony upon the question of whether the rule was violated. There

was disputed testimony tending to show that the extent of the operations of the Diamond Lumber Company and Spies-Thompson Company were each twice those of plaintiff; while a table of cars furnished that season put into the case by the defendant shows that for the month of December after the date plaintiff commenced operation he received 8 cars, the Diamond Lumber Company 45 cars, Spies-Thompson Company 47 cars; for January, plaintiff received 69 cars, the Diamond Lumber Company 221 cars, Spies-Thompson Company 271 cars; and for February, plaintiff received 44 cars, the Diamond Lumber Company 151, Spies-Thompson Company 191. There was also testimony that in the distribution of the "bunk" cars, so-called, a car desirable in shipping logs as it saved the shipper the expense of binding and securing the load, there was considerable favoritism shown the Diamond Lumber Company. While much of the testimony here detailed was disputed testimony, on a motion to direct a verdict for defendant that most favorable to plaintiff must be accepted. Under this rule we are satisfied that plaintiff was entitled under proper instructions to take the verdict of the jury on both his claims.

There remains to be considered two assignments of error based on the charge of the court. The first of these which we shall discuss covers the main part of the charge. It is insisted by counsel for the plaintiff that it is not sufficiently specific, and it is pointed out that it covers some two and one-half pages of the record. But the length of the assignment of error alone does not determine the question as to whether it is sufficiently specific. It is somewhat difficult to perceive, when we consider the charge, how error could be assigned upon it without setting forth the portion claimed to be erroneous. Without quoting the assignment of error in full it will suffice to state that the court charged the jury that the plaintiff could re-

cover if they found that defendant had unreasonably failed to furnish cars or had in fact unjustly discriminated against the plaintiff, and entirely eliminated from the consideration of the jury the question of whether the discrimination, if any, was due to the enforcement or the violation of a rule adopted by the shipper in case of car shortage; and the liability for failure to furnish and the liability for discrimination were interwoven in the portion of the charge upon which error is assigned. Without going over the ground again we may say that we have laid down the rule of law applicable to the case; we have pointed out that where the discrimination arose by reason of the enforcement of a rule the shipper cannot in any action at law recover for such damages without first having proceeded before the interstate commerce commission. In the portion of the charge now being considered the trial judge instructed the jury that he could recover if there was discrimination in fact and took no account of the question of the adoption of a rule. In this the court was in error. This question not only went to the right to recover but it also went to the jurisdiction of the court as we have pointed out.

The trial judge instructed the jury:

"The defendant was only bound to have on hand a sufficient supply of cars to meet the normal demands of the trade. It was not obliged to have a sufficient supply on hand to meet abnormal and unexpected conditions. But the normal demand of the trade is not to be estimated by the number of cars needed when the normal demand is least, but by the number when the normal demand is heaviest, in respect to a commodity, such as logs, where there are certain well known seasons during which the normal demand for log transportation is practically the same and heavier than at other times. And while the number of cars needed in each of the months of these seasons may be taken into consideration in determining the number needed to supply the demand during all of

the logging season, the number needed during the other months of the year outside of the logging season—the summer months, in this case—is entitled to little consideration in determining what number of cars is needed to supply the normal demand of the trade.”

The other assignment of error relates to that portion of the above quoted instruction after the first two sentences. This instruction followed the rule laid down by the court of last resort of Kentucky in the case of *Illinois Cent. R. Co. v. Coal & Coke Co.*, 150 Ky. 489 (150 S. W. 641, 44 L. R. A. [N. S.] 543, Ann. Cas. 1914C, 1255), and substantially contains the language of that court in deciding that question. We think it states the correct rule. In *Shoptaugh v. Railroad Co.*, 147 Mo. App. 17 (126 S. W. 752), it was said:

“Taking up the appeal on the merits, we hold it would have been a good defense if an extraordinary increase of business on defendant’s line, which could not have been anticipated and provided for by using judgment and diligence, had prevented defendant from furnishing the cars. Railroad companies are expected to be prepared with an equipment necessary to handle the average traffic over their lines and such an increase as would be expected by managers of experience, *for the volume of traffic will vary with the seasons and general business conditions. These contingencies ought to be provided for and the law requires them to be*; but a railroad carrier need not be ready to handle any accession of business, however great, which some unforeseeable condition may cause; and in case an extraordinary traffic occurs and consequent congestion of freight, the carrier must distribute its cars at the various stations in proportion to their needs.”

In the case of *State v. Railroad Co.*, 71 Neb. 593 (99 N. W. 309), it was said:

“It is the duty of a railroad company to provide itself with all the instrumentalities and facilities necessary to carry on the business for which it is organ-

ized. It must furnish the necessary cars to transport the goods which are offered to it for carriage, but to this rule there is an exception. When the carrier has furnished itself with the appliances necessary to transport an amount of freight which may, in the usual course of events, be reasonably expected to be offered to it for carriage, *taking into consideration the fact that at certain seasons more cars are needed*, it has fulfilled its duty in that regard, and it will not be required to provide for such a rush of grain or other goods for transportation as may only occur in any given locality temporarily or at long intervals of time."

The trial judge very carefully guarded his instruction and confined the rule to the *normal* demand of seasonal shipments. The defendant was bound to know that while the snow was on logs would be gotten out and offered for shipment; that more would be offered for shipment during that season of the year than at other seasons, was well known to the officers and agents of defendant, as this record discloses. The carrier is bound to know that at certain seasons of the year there will be movements of certain seasonal commodities, and was bound to anticipate and provide for such demand. There are certain portions of the State where fruit is raised in abundance and offered for shipment to the market. Clearly the carrier would not discharge either its common-law or its statutory duty by providing itself with only equipment sufficient to transport such fruit if given the entire year so to do. It must have sufficient equipment to transport such fruit when the *normal* demand is the greatest; and this is true and must be true of all seasonal freight. Any other rule would refuse to the shipper of seasonal commodities the markets of the country when such markets are open and available. We do not mean to say that the carrier is bound to provide for abnormal conditions, for unforeseen and unprecedented demands. In the instant case, the jury was told:

"The defendant was only bound to have on hand a sufficient supply of cars to meet the normal demands of the trade. It was not obliged to have a sufficient supply on hand to meet abnormal and unexpected conditions."

Further instructions were not requested and we discover no other error in the charge except the one noted. For this error the judgment must be reversed and a new trial granted, with costs to defendant.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

CARPENTER v. DENNISON.

1. QUIETING TITLE—EQUITY JURISDICTION TO ENTERTAIN BILL WHEN EJECTMENT PENDING.

A court of equity has no jurisdiction under 3 Comp. Laws 1915, § 12302, to entertain a bill to quiet title where plaintiffs claim a legal, record title and do not allege any fraud, accident, mistake, or other grounds of general equity jurisdiction, nor point out any impediment to their defense in an action of ejectment already pending.

2. COURTS—JURISDICTION—WAIVER.

Jurisdiction of the court over the subject-matter may not be acquired by waiver or consent.

3. APPEAL AND ERROR—DENIAL OF MOTION TO DISMISS—RIGHT OF APPEAL.

Defendant's right to appeal from denial of motion to dismiss bill is not absolute, but under 3 Comp. Laws 1915, § 13753, depends upon obtaining an order of a Justice of the Supreme Court to do so.

4. SAME — DENIAL OF MOTION TO DISMISS — JURISDICTION — RES JUDICATA.

Where defendant's motion to dismiss bill to quiet title on jurisdictional grounds was denied and without appealing therefrom he answered, reserving "all right of exception to the said bill of complaint," the question of jurisdiction is not therefor *res judicata*, but is open upon appeal from the decree.

Appeal from Kent; McDonald (John S.), J. Submitted October 15, 1919. (Docket No. 50.) Decided December 23, 1919.

Bill by Norman Carpenter and another against William H. Dennison to quiet title to land, and to enjoin an action of ejectment. From a decree for plaintiffs, defendant appeals. Reversed, and bill dismissed.

Smedley & Linsey, for plaintiffs.

P. H. Walsh, for defendant.

FELLOWS, J. On the 6th day of February, 1919, the defendant here, William H. Dennison, brought suit in ejectment in the Kent circuit court against the plaintiffs here, Norman Carpenter and Morris Carpenter, to recover the possession of the south $\frac{1}{2}$ of the south-east $\frac{1}{4}$ of the northeast $\frac{1}{4}$ of section 26 of the township of Sparta in Kent county. On February 17th, these plaintiffs filed this bill in the circuit court for the county of Kent, in chancery, to quiet their title to said premises and to restrain the further prosecution of such ejectment case. They claim a legal, record title and do not allege any fraud, accident, mistake, or other grounds of general equity jurisdiction, nor do they point out any impediment to their defense in the action of ejectment already pending. Defendant first moved to dismiss the bill on jurisdictional grounds, and upon such motion being overruled, answered, reserving to himself, however, "all right of

exception to the said bill of complaint"; and upon the hearing of the case in the court below and in this court he insists that a court of equity is without jurisdiction to entertain this bill to quiet title and to restrain the further prosecution of the ejectment case pending in the court which first obtained jurisdiction of the controversy between these parties over the premises here, and there, involved.

The plaintiffs insist upon their right to maintain this bill under the following provisions of section 12302, 3 Comp. Laws 1915:

"The powers and jurisdiction of the circuit courts and circuit judges in chancery, in and for their respective counties, shall be co-extensive with the powers and jurisdiction of the courts and judges in chancery in England as existing on March first, eighteen hundred forty-seven, with the exceptions, additions and limitations created and imposed by the Constitution and laws of this State. Said circuit court in chancery shall also have jurisdiction and authority: * * *

"4. To hear and determine suits instituted by any person claiming the legal or equitable title to lands, whether in possession or not, against any other person not in possession, setting up a claim thereto in opposition to the title claimed by the plaintiff: And, if the plaintiff shall establish his title to such lands, the defendant shall be decreed to release to the plaintiff all claims thereto."

While this subdivision of the section in its present form is the result of amendments, it originally was enacted in 1840 (Act No. 76, Laws 1840, p. 127). It has generally been recognized as declaratory of recognized jurisdiction of the courts of equity with amplification of their powers, and its object has been recognized by this court to be to enable one in possession of real estate (now including one out of possession where the other party is also out of possession) to remove all doubts as to his title caused by claims of third persons who are taking no steps to test the

validity of their claim and who by their refusal or neglect to take proceedings to have their title adjudicated cast a doubt upon the title which without the interposition of a court of equity remains a cloud upon such title to the injury of the true owner. But it has never been held, as we shall presently see, that the object of the act was to afford a defendant in an ejectment suit the option to deprive the plaintiff of his right to a trial by a jury, and permit him to elect in which court he would try the question of title.

Counsel for plaintiffs, in support of the contention that the bill is maintainable, cite the following cases: *Woods v. Monroe*, 17 Mich. 238; *Dale v. Turner*, 34 Mich. 405; *Olsen v. Williams*, 172 Mich. 316; *Conley v. Sinclair*, 163 Mich. 306; *Grand Trunk, etc., R. Co. v. Fuller*, 205 Mich. 486. But a careful examination of these cases shows that in each of them there were facts alleged bringing the case within the jurisdiction of a court of equity and calling for equitable relief, and that each case is clearly distinguishable from the instant case.

In *Woods v. Monroe, supra*, the defendants were severally bringing actions of ejectment with reference to a portion only of the premises involved. This court there said:

"The defendants were severally bringing actions against him in respect to one of the lots, and as he had an unquestionable right to file a bill to quiet his title to the others, and the questions were the same as to all, it was proper that, to avoid a multiplicity of suits, the ejectment suits should be enjoined, and the questions in controversy be all determined in one proceeding. Besides, the record title was in the defendants, which, of itself, would justify the bill."

In *Dale v. Turner, supra*, which involved the Federal and State legislation concerning swamp lands, this court expressly pointed out that complainant's title was an equitable title (p. 417).

In *Olsen v. Williams, supra*, the bill was filed to prevent a multiplicity of suits and upon that point this court cites and quotes from *Woods v. Monroe, supra*.

In *Conley v. Sinclair, supra*, an ejectment case had been instituted 25 years before by one Thomas Sinclair; it had been tried and a judgment rendered against Sinclair, which judgment had been affirmed by this court. A new trial had been granted under the statute then in force but the case had thereafter abated. The ejectment case was, therefore, no longer pending. It was held by this court that upon the abatement of the ejectment case the holder of the title could maintain a bill to quiet title.

In *Grand Trunk, etc., R. Co. v. Fuller, supra*, the question of jurisdiction was not considered, but an examination of the case will disclose that the plaintiff sought and obtained relief on equitable grounds.

Each of these cases presented a case for equitable relief upon equitable grounds and is in no way out of harmony with a long line of holdings by this court announcing the general rule that courts of law are the proper forum for the adjudication of legal titles.) . . .

Among the numerous cases see *Stockton v. Williams*, Walk. Ch. 120; *Devaux v. City of Detroit*, Harr. Ch. 98; *Blackwood v. Van Vleet*, 11 Mich. 252; *Moran v. Palmer*, 13 Mich. 367; *Tabor v. Cook*, 15 Mich. 322; *Methodist Church of Newark v. Clark*, 41 Mich. 730; *Chandler v. Graham*, 123 Mich. 327; *Moody v. Macomber*, 158 Mich. 209; *Berger v. Roe*, 179 Mich. 184. We quote from the syllabus in *Moran v. Palmer, supra*:

"A bill to quiet title will be entertained on behalf of the legal owner when he is not in a position to force the adverse claimant into a court of law to test its validity; but when each party claims the legal title, and a court of law is already possessed of the case, and it is not alleged that either fraud, accident or mis-

take has intervened to prevent the possessor establishing his title at law, equity will not interfere."

This case was written when parties, as a matter of right, had two trials in ejectment cases, and defendants had successfully maintained their rights upon the first of these trials. Mr. Justice COOLEY, speaking for the court, said:

"We have thus presented to us the anomaly of a party who asserts that he is possessed of a complete legal title to lands which are occupied by him, and who points out no difficulty in the way of his exhibiting and establishing such title, appealing to a court of equity for relief against the claims of other parties who are pressing their claims against him at law, and have already obtained an adjudication in their favor. Argument to show that this bill cannot be sustained is entirely unnecessary."

In *Tabor v. Cook*, *supra*, the same Justice, speaking for the court, said:

"It is not in the power of the legislature, under our present Constitution, to provide for the trial of titles to land in equity, in the cases which were triable at law at the time the Constitution was adopted, unless it shall first make provision for having the case tried by jury if the defendant shall so elect."

In *Methodist Church of Newark v. Clark*, *supra*, it was said:

"The bill is a bill to quiet title. A bill for that purpose is based upon an actual possession by complainant of the land in dispute, and when sustained, it is upon the ground that complainant has no other means of bringing his title to an adjudication."

And in *Moody v. Macomber*, *supra*, Mr. Justice MONTGOMERY, speaking for the court, said:

"We think it far better that the practice should be adhered to, and that the title to real estate should not be left to be tried in equity where the remedy of ejectment is open, unless the case is distinctly brought under some other head of equity jurisprudence."

But it is insisted by plaintiff's counsel that defendant is not in position to raise this question; that the order denying defendant's motion to dismiss is *res adjudicata*; that not having been appealed from, it is final and the question not now available. This overlooks the character of the question under consideration, that it is a question of jurisdiction, and of jurisdiction of the court over the subject-matter. While opinions may be found in this court holding that this question of jurisdiction may be waived, and cases which have disposed of the controversy notwithstanding the jurisdictional question, the tendency of the later decisions of this court is to hold that jurisdiction of the subject-matter, jurisdiction of the case itself, jurisdiction of the court, may not be acquired by waiver or consent. *Riley v. Railway*, 163 Mich. 327; *J. F. Hartz Co. v. Lukaszewski*, 200 Mich. 230; *Bolton v. Cummings*, 200 Mich. 234; *Miller v. Johnson*, 201 Mich. 535; *Monroe, Boyce & Co. v. Ward*, 207 Mich. 369. The defendant made his motion to dismiss, he reserved the question by his answer, he seasonably raised the question on the hearing. This court in three of the cases last above cited, upon its own motion, dismissed writs of error where it had not acquired jurisdiction. Defendant had no absolute right to appeal to this court from the order denying his motion to dismiss. By section 13753, 3 Comp. Laws 1915, he could only do so by obtaining an order of a Justice of this court.

The question of jurisdiction of the court over the subject-matter is here open to the defendant to urge upon this record and his contention is sustained. A decree will be entered dismissing the bill with costs of both courts to defendant.

BIRD, C. J., and SHARPE, MOORE, STEERE BROOKE, STONE, and KUHN, JJ., concurred. , ~

CLIFFORD v. CATHOLIC MUTUAL BENEFIT ASS'N.**1. INSURANCE—LIFE INSURANCE—BENEFICIAL ASSOCIATIONS — FORFEITURE—NONPAYMENT OF DUES.**

A mutual benefit association may not declare a forfeiture of the policy of insurance where it has in its hands money belonging to the policyholder sufficient to pay and discharge the dues and assessments when due and payable.

2. SAME—ACQUIESCENCE—ESTOPPEL—FORFEITURE.

Nor may it invoke the doctrine of acquiescence and estoppel to work a forfeiture of the policy of insurance where it has in its hands money it has unlawfully exacted sufficient to make all payments due upon the policy, even though considerable time has elapsed since the unlawful exaction.

3. TRIAL—INSTRUCTIONS—CHARGE AS WHOLE.

In an action on a mutual benefit policy, claimed by the defendant association to be forfeited for nonpayment of dues, the use by the trial judge of the word "abhor," in explaining to the jury that forfeitures are not favored either at law or in equity, while unfortunate, *held*, not reversible error where the charge as a whole fully protected the rights of defendant.

Error to Wayne; Hunt (Ormond F.), J. Submitted October 31, 1919. (Docket No. 115.) Decided December 23, 1919.

Assumpsit by Josephine Clifford against the Catholic Mutual Benefit Association on a policy of insurance. Judgment for plaintiff. Defendant brings error. Affirmed.

Keena, Lightner, Oxtoby & Hanley, for appellant.

Wm. Henry Gallagher and *Francis T. McGann*, for appellee.

FELLOWS, J. For nearly 30 years Thomas B. Clifford was a member of branch No. 1 and held a policy of insurance in the sum of \$2,000, issued by the defendant, Catholic Mutual Benefit Association. His wife, Josephine Clifford, the plaintiff, was named as beneficiary. He died December 13, 1916. This action is brought by her to recover on such policy. The defense is that Mr. Clifford was not a member in good standing at the time of his death in that he had failed to pay an assessment of \$2.50 and dues of 30 cents, both of which were due and payable during the month of November, and for failure to pay which, it is claimed, he automatically stood suspended. It appears from the testimony of the plaintiff that in the main the payments were made by her and she testifies to a number of occasions covering a period of years when she was required by the financial secretary to pay, and did pay, sums in excess of the lawful assessments, dues, and fines; she testifies that she was told she would have to pay the amounts demanded or get out. The items of overpayment testified to by her aggregate \$5.05. It is not claimed that the financial secretary was not the agent of defendant or that he was not the proper party to whom payment should be made. These overpayments are denied by the officers of the association, but an auditor called as a witness by defendant, after auditing its books, testifies to an overpayment of dues during a period of 11 years of \$1.20. Summarized, there was testimony from which the jury would be authorized in concluding that plaintiff had overpaid the sum of \$5.05 of which \$1.20 had been applied to and was an overpayment on the dues of the local branch. This would leave in the hands of the defendant \$3.85 belonging to Mr. Clifford which had not been appropriated to the payment of dues. The plaintiff's right to go to the jury and to

recover was sustained in the trial court on the authority of *Albrecht v. Annuity Ass'n*, 129 Mich. 444, and a verdict rendered and judgment had for the amount of the policy with interest. The errors assigned and principally argued relate to the refusal of the court to direct a verdict. Error is also assigned and argued on a portion of the charge. No other assignments of error are urged in defendant's brief.

We do not think the question of payment to an unauthorized agent is before us upon this record. While it is undisputed that the financial secretary, Mr. Stevenson, was the proper officer to whom payment should be made, and that one of the payments was made to a Mr. O'Rourke, the recording secretary, still the testimony discloses that Mr. Stevenson was the one who fixed the amount to be paid, plaintiff was directed to make the payment to the recording secretary with the statement that it would be turned over to Mr. Stevenson, and when she afterwards talked with Mr. Stevenson about it, he did not deny receiving the money but claimed that she owed it.

Nor have we the case before us, at least not undisputedly so that we could dispose of it as a matter of law, of overpayments of *dues*, to a subordinate lodge, which are sought to be applied to the extinguishment of *assessments* levied by, and payment to, the supreme body. If Mrs. Clifford had made overpayments of \$5.05 to defendant's agent, and but \$1.20 had been applied, and improperly applied, to the payment of dues, manifestly she had overpaid the sum of \$3.85, which was still in the hands of defendant's agent.

While counsel for defendant lays greater stress on the question which we shall presently discuss, an examination of the authorities cited by him would indicate a claim that the rule laid down by this court in *Albrecht v. Annuity Ass'n*, *supra*, ought not to be followed in the instant case and that the principle in-

volved in that case should not be extended. The contention of the plaintiff is that defendant, a mutual benefit association, may not declare a forfeiture of the policy of insurance where it has in its hands money belonging to the policy holder sufficient to pay and discharge the dues and assessments when due and payable. We think the contention of plaintiff's counsel finds support in the *Albrecht Case*, and that it is in consonance with the great weight of authority. See *Girard Life Ins. Co. v. Mutual Life Ins. Co.*, 97 Pa. St. 15; *Elliott v. Grand Lodge*, 2 Kan. App. 430 (42 Pac. 1009); *Fraternal Aid Ass'n v. Powers*, 67 Kan. 420 (73 Pac. 65); *Knight v. Supreme Council*, 6 N. Y. Supp. 427; *Brady v. Benevolent Ass'n*, 14 N. Y. Supp. 272; *Supreme Lodge O. M. P. v. Meister*, 204 Ill. 527 (68 N. E. 454); *Knights Templars Indemnity Co. v. Vail*, 206 Ill. 404 (68 N. E. 1103); *Price v. Brotherhood of R. R. Trainmen*, 116 Minn. 275 (133 N. W. 793); *Columbian Relief Fund Ass'n v. Hopper*, 24 Ind. App. 169 (53 N. E. 1051); *Rambousek v. Supreme Council*, 133 Iowa, 375 (106 N. W. 947); *Clark v. Traveling Men's Ass'n*, 156 Iowa, 201 (135 N. W. 1114, 42 L. R. A. [N. S.] 631); *Supreme Council C. K. A. v. Fenwick*, 169 Ky. 269 (183 S. W. 906); *Supreme Council C. K. A. v. Wathen*, 179 Ky. 64 (200 S. W. 320); Niblack on Accident Insurance & Benefit Societies (2d Ed.), § 271; 14 R. C. L. p. 965.

The claimed overpayments were small amounts and extended over a considerable number of years. Plaintiff testifies that she repeatedly importuned the financial secretary to put them on her book; the book was used in place of a receipt and showed the amount credited for both dues and assessments. It is the claim of defendant that there was an acquiescence by plaintiff, and that she is now estopped from insisting in this action that such payments were overcharges, overpayments that should at this late date be applied to

the payment of the November dues and assessments. It is pointed out that the dues and assessments were payable monthly, and that after the entry had been made in her book it was returned to her and she could see the credits made, and that, if she claimed or thought she was entitled to further credits, she should not have permitted the matter to stand for a period of years; defendant's counsel cites cases dealing with an account stated, and cases analogous to those dealing with an account stated; he also cites insurance cases from other jurisdictions which by analogy are thought to be applicable here. But we do not think these cases are controlling in the instant case. While there is some language in the prevailing opinion in *Ancient Order United Workmen v. Moore*, 1 Ky. L. R. 93, giving support to defendant's claim, a very recent speaking of that court in *Supreme Council C. K. A. v. Fenwick*, *supra*, in unmistakable language denies the application of the doctrine of estoppel to a case quite similar to the one in hand. In that case an invalid amendment had been made to the by-laws of the association increasing the assessments. The member paid them for a number of years. Upon his death it was insisted that by the collection of the illegal assessments the association had in its hands sufficient funds to discharge the amount legally collectible. On behalf of the company it was insisted that the doctrine of acquiescence and estoppel should be applied. It was said by the court:

"But it is insisted that the defense of estoppel is available in this case because the insured acquiesced in the increased assessments and paid them for a number of years. On this point, however, the authorities do not differ, and the rule is well established that the mere fact that the holder of a certificate of a benefit association pays illegal assessments levied against his certificate in violation of his contract, rather than take the possible chances of having his

certificate forfeited, does not estop him or his beneficiary from questioning the legality of subsequent similar assessments (citing authorities). The basis of such holding is that the certificate holder, by making such payments, cannot be said to have acted fraudulently or willfully to have done anything to mislead others to their prejudice."

In *Clark v. Traveling Men's Ass'n*, *supra*, there had been an illegal exaction by the association and it was sought by the defendant to apply the doctrine of acquiescence; this the court refused to do, saying:

"There can be no acquiescence without full knowledge; nor will the doctrine be applied in aid of a forfeiture where an illegal exaction has been made."

See, also, *Benjamin v. Life Ass'n*, 146 Cal. 34, 49 (79 Pac. 517); *Supreme Council C. K. A. v. Logsdon*, 183 Ind. 183 (108 N. E. 587); *Covenant Mutual Life Ass'n v. Tuttle*, 87 Ill. App. 309; *Duggans v. Life Ass'n*, 87 Ill. App. 415; *Fort v. Legion of Honor*, 146 Iowa, 183 (123 N. W. 224).

We conclude that defendant may not invoke the doctrine of acquiescence and estoppel to work a forfeiture of this policy of insurance where it has in its hands money it has unlawfully exacted sufficient to make all payments due upon the policy, even though considerable time has elapsed since the unlawful exaction. The trial judge did not err in refusing defendant's motion for a directed verdict.

Error is assigned on a portion of the charge in which the trial judge used the expression, "I can in a general way say the law does abhor forfeiture," particular stress being laid on the use of the word "abhor." While the trial judge could possibly have found a less objectionable word to express the thought that forfeitures are not favored either at law or in equity (*Lyon v. Insurance Co.*, 55 Mich. 141), when we take the charge as a whole, as we must do, the rights of

the defendant were fully protected and the jury was told on more than one occasion that plaintiff could not recover if the insured was in default, that he was bound by the laws of the order and so was his beneficiary. He said:

"I charge you as a matter of law that the deceased, Thomas Clifford, was bound by the laws, as is also his beneficiary, the plaintiff in this case, and that if you find he was suspended at the time of his death, your verdict should be no cause of action."

Later in his charge, after telling the jury that they must not allow sympathy to influence their verdict, he again charged the jury in the following language:

"You are to hold the plaintiff, Thomas Clifford, bound by all the rules and by-laws of this order.

"You are also to say whether or not he was in default and was or was not in suspension at the time of his death by reason of his failure to conform to and comply with all the laws, rules and regulations of the order. That is a question of fact for you. If he was in suspension at that time, the plaintiff beneficiary in this case cannot recover."

The charge as a whole was quite favorable to defendant.

We find no grounds for reversal in the errors discussed, and therefore affirm the judgment.

BIRD, C. J., and MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred. SHARPE, J., did not sit.

MICHAELS v. PINTEN.

1. TRIAL—INSTRUCTIONS—CHARGE AS WHOLE.

In an action to recover a balance claimed to be due on a building contract, where the amount of the contract was in dispute, it was not error for the trial court to use the expression "was in the neighborhood of \$5,100," in charging the jury in reference thereto, it appearing from a reading of the whole sentence that the court was stating the claims of the respective parties and clearly presenting the issue to the jury.

2. SAME—INSTRUCTIONS—REQUESTS TO CHARGE.

In such action, where the fact that the plaintiff had had years of experience as a contractor and builder was a circumstance already before the jury, the trial court was not in error in refusing to call the attention of the jury especially to it.

3. SAME—REBUTTAL—EVIDENCE—ADMISSIBILITY.

Where plaintiff had testified, in support of his theory that the contract price was greater than defendant claimed, as to the cost and expense of erecting such a building, testimony of defendant and his wife, in rebuttal, that the building was leaky, was admissible on the theory that defective work did not cost as much as careful and satisfactory work.

4. EVIDENCE—CONTRACTS—GRATUITOUS WORK—BUILDING CONTRACT.

In an action to recover a balance claimed to be due on a building contract, where the amount of the contract was in dispute, testimony as to the amount of work and labor furnished gratuitously by the plaintiff was properly rejected, being irrelevant and immaterial to the issue.

5. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—KNOWN AT TIME OF TRIAL.

It was not error to refuse a new trial on the ground of newly-discovered evidence, where such evidence was the fact that defendant had applied to a building and loan association for a loan, and, upon the record, was known to plaintiff at the time of the trial.

6. EVIDENCE—JUDICIAL NOTICE.

The Supreme Court will take judicial notice of the fact that the trial took place in the immediate vicinity of the home office of a building and loan association.

7. NEW TRIAL—NOT FAVORED ON GROUND OF NEWLY-DISCOVERED EVIDENCE.

Motions for new trials upon the ground of newly-discovered evidence are not favored by the courts.

8. SAME—IMPEACHMENT—LACK OF DILIGENCE.

Where the most that can be said for newly-discovered evidence is that it might have tended to impeach defendant in some particulars, but there was lack of due diligence on the part of plaintiff, a new trial on this ground was properly denied.

9. SAME—OVERWHELMING WEIGHT OF EVIDENCE.

Verdict *held*, not to be against the overwhelming weight of the evidence.

10. APPEAL AND ERROR—ASSIGNMENTS OF ERROR.

Where the fact that plaintiff, by undisputed evidence, was entitled to a verdict for the sum of \$28.76 was overlooked by both counsel and court until raised by plaintiff's counsel on motion for new trial, a judgment for defendant will not for that reason be set aside and a new trial granted; there having been no assignment of error upon the subject.

Error to Houghton; O'Brien (Patrick H.), J. Submitted October 21, 1919. (Docket No. 88.) Decided December 23, 1919.

Assumpsit by John J. Michaels against Philip J. Pinten for a balance due upon a building contract. Judgment for defendant. Plaintiff brings error. Affirmed.

J. F. Hambitzer, for appellant.

B. H. T. Burritt, for appellee.

STONE, J. The plaintiff is, and has been for about 20 years, a contractor and builder in Houghton county.

This suit was brought to recover a balance claimed to be due him from the defendant upon a building contract made in June, 1916. Plaintiff's claim is concisely stated in the declaration to be that on or about June 14, 1916, he made the defendant a bid to excavate for a cellar and basement, and to furnish the labor and material for erecting a dwelling house and painting and decorating the same for \$5,360.37, which said bid was made in writing and delivered to defendant; that after the receipt of said bid, defendant directed the plaintiff to proceed with the erection of the building according to the plans and specifications; that said bid did not include heating and plumbing; and that on or about June 16, 1916, defendant requested the plaintiff to secure an estimate and make a bid for furnishing materials and labor for heating and plumbing said dwelling house; that plaintiff at once secured an estimate of the cost for heating and plumbing from an experienced and competent plumber, which estimate was in the sum of \$1,068, which was submitted to the defendant, and the plaintiff was directed to proceed with the work, and furnish materials for said heating and plumbing, which made the contract price for work and labor and materials, including plumbing and heating, \$6,428.37; that after said bid was accepted, certain modifications and changes were made, which were mutually agreed to by the parties, from time to time during the progress of the erection of said building, which the defendant agreed to pay for as extras, as shown by the bill of particulars annexed to and made a part of the declaration; that the amount of the extras, including the plaintiff's services, amounted to \$1,428.76; that plaintiff furnished the labor and materials for all of the above matters, including said extras, for which defendant agreed to pay the plaintiff \$7,857.13; that after the plaintiff had completed said dwelling house in accordance with said modified plans,

including said extras, the defendant accepted and occupied the said dwelling, and has ever since occupied the same as a home; that defendant has paid to the plaintiff on account of said work and labor, and for furnishing said materials, as aforesaid, \$6,500, leaving a balance due the plaintiff of \$1,357.13, with interest from the date of such occupancy.

The plea was the general issue with notice of settlement and payment in full. Upon the trial there was no question that the plans agreed upon by the parties were known as the "Radford plans," with certain modifications, although certain plans called the "Maas plans" were discussed. A sharp issue of fact arose as to the price agreed upon. The plaintiff was not able to produce his written bid, it being claimed that the same had been mislaid or lost, and defendant denied that he ever had one. This issue, which was a vital one, was clearly submitted to the jury by the trial court. After stating the plaintiff's claim to be as substantially set forth in the declaration, the court said:

"On the other hand, the defendant denies that the total amount of the bid or agreed price of putting up the house which was built by the plaintiff for the defendant, was the sum of \$6,428.37, as claimed by the plaintiff, but insists that he, the defendant, notified the plaintiff, time and time again, that he did not want to put in excess of \$5,000 into a house, and that he could not afford to do it, and that the Maas plans were submitted to him, but that his wife wouldn't have anything to do with them, and did not want them, and finally the Radford plans were gone over by the plaintiff, at the request of the defendant, and certain alterations or deductions were made from the Radford plans which brought the total down to \$5,100 to complete the building according to those plans, and that that sum was to include plumbing and heating; and it is the claim of the defendant that one evening the defendant and his wife, at a meeting in the plaintiff's office, talked over the Radford plans, as finally altered

to conform with the sum of \$5,100, and that the plaintiff then agreed that he would erect such a dwelling for the sum of \$5,100 all complete.

"So, gentlemen, the real issue that you are called upon to determine in this case is, What was the price agreed upon to erect this dwelling? Was it the sum of \$6,428.37 as claimed by the plaintiff, or was it the sum of \$5,100, as claimed by the defendant? There is no dispute as to the charges for extras amounting to the sum of \$1,428.76. Neither is there any dispute in regard to the amounts of payments made by the defendant, amounting to \$6,500. The only question for you to determine is, What was the amount of the sum to be paid by the defendant for the building complete, according to the Radford plans?"

These figures were reiterated in the charge, and finally the court said:

"If you find that the bid for the Radford plans, as modified, was \$6,428.37, including plumbing and heating, and there being no dispute about the extras, your verdict will be in favor of the plaintiff and against the defendant for the sum of \$7,857.13, less \$6,500 paid by defendant, and add interest at five per cent. \$73.51, making a total due the plaintiff of \$1,430.64. On the other hand, if you find that the bid was not for the sum of \$6,428.37, but was in the neighborhood of \$5,100 as claimed by the defendant, then your verdict will be no cause of action, because if that was the contract, that is, the sum of \$5,100, the plaintiff has been fully paid, both for the contract price and the extras."

An extended discussion of the evidence would serve no good purpose. It is sufficient to say that there was here a clear cut question of fact, making a sharp issue, and it was submitted to the jury in a clear charge.

All of plaintiff's requests to charge were given except the 8th, which was as follows:

"In determining the question as to the amount of the bid made by the plaintiff, for building according

to the Radford plans, you may take into consideration the years of experience of Mr. Michaels as a contractor, and the actual cost of erecting and completing said building."

The jury were instructed by the court that they might consider a paper called the "bidding sheet," as bearing upon the probabilities of the claim of the plaintiff and his bookkeeper, provided that they found this bidding sheet was made at the time they were figuring on the price which the dwelling house was to cost the defendant. The jury were also charged:

"You also have a right to determine the actual cost of the building as bearing upon the probabilities regarding the bid made";

—and two witnesses testified as to the actual cost of erecting and completing such a building; but the jury were instructed that they would consider this evidence simply in determining the probabilities of the amount actually agreed upon between the parties, because it was the amount which was actually agreed upon which was to be determined by the verdict.

Upon the examination of defendant's wife she was permitted to testify as to the leaky condition of the building and the damage done thereby to the interior. She testified:

"Well, we moved into the house in July, and I think, about September, we had a terrible rainstorm from the east, and I called Mr. Michaels. The fireplace leaked around the chimney and I think about ten windows leaked. He said, 'A driving rain like that, it would not happen again.' And these last couple of months we have had quite a little rain and it has been coming in from several places and some of the ceilings have been leaking. His man came to see them and fixed the fireplace and a carpenter came and fixed the windows."

This testimony was objected to by plaintiff's counsel because there was no claim of recoupment in the

pleadings. The court permitted the evidence as tending to show the real cost of erecting the building, holding that it did not cost as much to do defective work as it would to do careful and satisfactory work. Upon the trial the plaintiff offered testimony as to the amount of work and labor furnished gratuitously by the plaintiff for the defendant in the construction and completion of the building. This being objected to as incompetent and irrelevant, the objection was sustained, there being no claim made for such gratuitous work. The jury returned a verdict of no cause of action, and a judgment for the defendant, with costs, followed:

There was a motion for a new trial entered by the plaintiff, based upon the following reasons:

(1) That new testimony had been discovered since the trial of the case, which was not known to the plaintiff or his attorney to be in existence before, or at the time of said trial, which said newly-discovered evidence was in the form of an application for a loan of \$2,500 on the house which was the subject of litigation in said suit, which application was signed by the defendant on June 21, 1917, and delivered to the Detroit & Northern Building & Loan Association at its office in Hancock, Michigan, wherein it was claimed material facts were stated by the defendant which impeached his testimony and the testimony of his wife. Those are stated in detail.

(2) That the court erred in not giving plaintiff's 8th request to charge.

(3) Error in permitting defendant's witness to testify, after objection, regarding the leaky condition of the house.

(4) That the court erred in not permitting the plaintiff and his witnesses to testify as to the amount of labor and materials furnished the defendant gratuitously, which they claimed to be upwards of \$400 in amount.

(5) That the verdict was against the weight of the evidence.

The motion for a new trial was denied by the trial court, and its reasons therefor were filed. As to the first point urged the circuit judge said:

"The testimony is not newly-discovered, because upon the cross-examination of the defendant, his attention was called to the fact that he had made an application to the building and loan, and there was plenty of opportunity upon the trial to have brought in the application if it were deemed material. In the opinion of the court, the new testimony would have no tendency to alter the verdict given at the trial. While parts of the application may be considered as corroborating the plaintiff's theory, there are other parts that tend to corroborate the defendant's theory, and on the whole, it would be a question whether it would have any weight one way or the other with the jury."

2. Answering the second point urged in the motion, being the refusal to give the 8th request to charge, the trial court said:

"I have not a copy of the charge before me, but I am of the opinion that so far as the principle involved in the charge is concerned, it was given in the general charge of the court. In any event, this request would have the effect of calling the attention of the jury to the testimony of the particular witnesses in an argumentative way, and for that reason was properly refused. Taking the charge as a whole, I do not think that there was any error in refusing request No. 8."

3. In answering the third point of the motion the learned circuit judge said:

"The plaintiff was permitted to offer in evidence, and did offer in evidence testimony of estimates made as to the cost of construction of a building such as the dwelling erected for the defendant, and was also permitted to display his books of account and all of the data that would assist the jury in forming an estimate of the cost of said dwelling; and in rebuttal of that testimony the defendant was permitted to introduce evidence showing that there were certain de-

fects in the construction. I take it that the testimony offered by the defendant was material in showing the real cost of the building. It does not cost as much to do defective work as it does to do careful and satisfactory work, and the testimony was offered in support of both propositions, the plaintiff having been given full leeway to introduce anything that he had which would tend to establish his claim that the building cost as much as he claimed the bargain was. Taking the case as a whole, I can see no error in the admission of that testimony from the defendant."

4. The trial judge found upon the fourth point in the motion as follows:

"The plaintiff was not permitted to testify as to the amount of labor and materials which he furnished gratuitously. This testimony would be immaterial to show what the building actually cost, because the labor and materials furnished gratuitously were not considered in the estimates made by the plaintiff, and, therefore, could not in any sense be said to support his theory of the case. Neither did it have any tendency to refute the claim made by the defendant as to the defects in such material and parts of the work as were claimed to be defective. I am of the opinion, therefore, that the court did not err in excluding the proffered testimony as to labor and material gratuitously furnished."

5. As to whether the verdict was contrary to the great weight of the evidence, the trial judge met this proposition by saying that, while the plaintiff made a strong case in favor of his contention, in his opinion, the defendant and his wife were equally honest in their contention as to what they claimed the bargain was, and that it could not be said that the verdict was contrary to the great weight of the evidence.

The point is sought to be made by plaintiff's counsel that in any view of the evidence the plaintiff was entitled to a verdict for \$28.76. Not only was no such point made upon the trial of the case, nor in the motion for a new trial, but there is no assignment of

error reaching this question. Upon that subject, however, the trial judge said:

"There has been brought to my attention for the first time at the hearing on the motion for a new trial, that in any view of the evidence, the plaintiff would be entitled to the sum of twenty-eight dollars and some odd cents. There was no such claim made at the trial. The issue was a clear cut one for an amount claimed by the plaintiff on the one hand, and the defendant claiming that he had fully paid, or overpaid the plaintiff on the other, the real issue depending upon what was the exact amount of the original contract. Under these circumstances, I feel as though it would be an injustice to reopen this case, even though it should now appear upon an exact examination of the question that the plaintiff would have been actually entitled to twenty-eight dollars under any view of the testimony. If that were the case, such a theory should have been presented at the trial, and should not be raised for the first time on a motion for a new trial."

Exception was duly taken to the order overruling the motion for a new trial. The plaintiff has brought the case into this court upon writ of error, and the errors assigned cover the same questions that were raised in the motion for a new trial; and the additional one that the court erred in overruling the motion for a new trial.

1. The first assignment of error criticizes that portion of the charge, set out by us, where the court uses the expression: "was in the neighborhood of fifty-one hundred dollars." Fairness to the trial court should at least have led counsel to give the whole sentence in which the expression was used. That appears in that portion of the charge which we have set forth, the court adding: "as claimed by the defendant, then your verdict will be no cause of action, because if that was the contract price, that is, the sum of \$5,100, the plaintiff has been fully paid both for the contract price and the extras." We are not impressed that

there is any merit in this assignment of error. The court repeatedly charged the jury as to the respective claims of the parties, and it would be difficult to present an issue more clearly than was done in this case.

2. Refusal to give plaintiff's 8th request to charge. The plaintiff had testified that he had been engaged in the building business in Houghton and vicinity for about 20 years. That fact was undisputed, and was before the jury. The real gist of this request to charge, which is complained of, is that the court did not say to the jury that they might take into consideration the years of experience of Mr. Michaels as a contractor, because the court did submit to the jury the question as to the actual cost of erecting and completing said building. The fact that the plaintiff had had years of experience was a circumstance already before the jury, and we do not think it was error for the court to decline to call their attention especially to it. He had advised the jury to review carefully all the circumstances in the case, but did not call attention to any particular witness. We find no error here.

3. Did the court err in permitting the defendant and his wife to testify as to the leaky condition of the building? We think the reason given by the circuit judge in denying the motion for a new trial upon this point is sufficiently clear to show that there was no error in receiving this testimony under the circumstances; the plaintiff had gone into general testimony as to the cost and expense of erecting such a building. This testimony was offered in rebuttal of the plaintiff's claim that the building was erected in good and workmanlike manner, and was worth the amount claimed by the plaintiff.

4. We think the court's ruling in refusing to receive testimony as to the amount of work and labor furnished gratuitously by the plaintiff in the construc-

tion of the building was correct. There was no issue upon that subject, and the matter was entirely irrelevant and immaterial to the issue.

5. Did the court err in refusing to grant a new trial on the ground of newly-discovered evidence? We think not. The fact that defendant had made an application to the loan association was, upon this record, well known to the plaintiff. The money resulting from this loan had been sent by the building and loan association directly to the plaintiff. The court will take notice that the trial took place in the immediate vicinity of Hancock, the home office of the building and loan association. We agree with the circuit judge in holding that this was not newly-discovered evidence in the proper sense of that term. Motions for new trials, upon the ground of newly-discovered evidence, are not favored by the courts. The so-called newly-discovered evidence might have tended to impeach the testimony of the defendant in some particulars, but, taken as a whole, we doubt if it even did this. We think there was a lack of due diligence on the part of the plaintiff, as held by us in numerous decisions upon the question. *Canfield v. City of Jackson*, 112 Mich. 120; *Edwards v. Foote*, 129 Mich. 121, 125; *First National Bank v. Union Trust Co.*, 158 Mich. 94, 105; *Spray v. Ayotte*, 161 Mich. 595.

6. Was the verdict against the overwhelming weight of the evidence? We cannot say, after carefully reading this record, that it was. There was a sharp issue upon a single point with numerous witnesses upon each side. The case presented was one of fact, pure and simple, and the jury, under a clear and explicit charge, have answered the question by their verdict, and we do not think we should disturb that verdict.

7. Should this judgment be set aside and a new trial granted, because by the undisputed testimony there was due the plaintiff at the trial the sum of

\$28.76? This did not come to the attention of either the court or counsel during the trial of the case. There was no request upon the subject. The case was tried upon the issue as to what the contract price for the erection of the building was. This balance due was overlooked, by both counsel and court, until the court's attention was first called to the fact on the argument of the motion for a new trial, it not being even mentioned in the motion itself. It is a sufficient answer to this whole question to say that there is no assignment of error upon the subject. That relating to the weight of the evidence does not reach it. So far as the \$28.76 are concerned, the plaintiff could have brought action in justice's court therefor. Under 3 Comp. Laws 1915, § 13688, subd. 5, had a verdict been rendered and judgment entered for the sum of \$28.76, the plaintiff could not have recovered costs against the defendant. But, on the contrary, under 3 Comp. Laws 1915, § 13691, the defendant would be entitled to a judgment against the plaintiff for his full costs, which would be more than the balance due. We think the offer made by defendant's counsel, "that the verdict be affirmed without costs to the defendant in the circuit court," a very just one.

We find no reversible error in the record and the judgment of the circuit court is affirmed, with costs of this court to the defendant, but without costs in the circuit court, by reason of defendant's waiver of such costs.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

ALBRIGHT v. STOCKHILL.**1. FRAUDULENT CONVEYANCES—"BULK SALES LAW," SALES IN VIOLATION OF—VOID AS TO CREDITORS—VALID BETWEEN PARTIES.**

The "bulk sales law" (2 Comp. Laws 1915, § 6346 *et seq.*) was enacted for the purpose of preventing fraud by debtors upon creditors, and a sale made in violation thereof is void only as to creditors, and is valid between the seller and buyer.

2. SAME—FRAUD—RIGHT OF DEFRAUDED PARTY TO RELIEF.

If in a sale made in violation of the "bulk sales law" the seller has been guilty of any fraud to the injury of the buyer, or if there has been a grossly inadequate consideration, the seller cannot hide behind the statute and thus avoid liability to the buyer.

3. EQUITY—FRAUD—"CLEAN HANDS"—VIOLATION—"BULK SALES LAW."

In a suit to rescind, on the ground of fraud and failure of consideration, a contract for an exchange of plaintiff's farm for a stock of goods and other property belonging to defendant, without complying with the "bulk sales law," the doctrine of "clean hands" has no application, the rights of creditors not being affected.

4. SAME—GROSS INADEQUACY OF CONSIDERATION.

Mere inadequacy of consideration, unless it is so gross as to shock the conscience of a chancellor, is not itself a ground on which a contract will be rescinded, and where the consideration failed in part, damages may be awarded to the amount plaintiff is damnified, instead of the contract being rescinded.

5. SAME.

Where the consideration is so grossly inadequate as to shock the conscience, courts will interfere, although there has been some exercise of judgment by the parties fixing it.

6. FRAUDULENT CONVEYANCES—"BULK SALES LAW," SALE IN VIOLATION OF—VOID AS TO CREDITORS.

No contract of sale valid as to creditors of the seller can

On effect of misrepresentations in statement seller is required to make as a condition of a valid sale in bulk, see note in 45 L. R. A. (N. S.) 492.

be entered into unless the requirements of the "bulk sales law" are complied with.

7. FRAUD—MATTERS OF OPINION—VENDOR AND PURCHASER.

Mere expressions of matters of opinion as to values, upon which men might fairly and honestly differ, cannot be made the basis of fraudulent representations.

8. SAME—REPRESENTATIONS—EVIDENCE—SUFFICIENCY.

In a suit to rescind a contract whereby plaintiff received, in exchange for his farm, among other property, an electric light plant, testimony in support of plaintiff's claims of fraudulent representations as to cost of operating and income from same, *held*, insufficient to sustain the burden of proof.

9. EQUITY—FRAUD—GROSS INADEQUACY OF CONSIDERATION—EQUITABLE RELIEF.

Where, in exchange for plaintiff's farm, defendant put in as part of the consideration therefor a stock of goods without complying with the "bulk sales law," and without revealing to plaintiff the fact that creditors' claims equaled the value thereof, and to the extent of such value the consideration failed, whether the withholding of such information was intentional or due simply to ignorance of the law, there was such failure of consideration, amounting to gross inadequacy of consideration, as calls upon a court of equity to grant relief.

10. SAME—JURISDICTION—RELIEF.

Although at the time plaintiff filed his bill he was not in position to ask rescission, equity will retain jurisdiction and grant such relief in damages as he is entitled to.

11. SAME—REMEDY AT LAW—FAILURE OF CONSIDERATION—EQUITABLE RELIEF.

The mere fact that the person defrauded might have a remedy at law would not deprive him from coming into a court of chancery and having the agreed consideration, or the value of the premises, declared to be an equitable lien upon the lands.

Appeal from Ionia; Davis (Frank D. M.), J. Submitted April 29, 1919. (Docket No. 23). Reargued November 5, 1919. Decided December 23, 1919.

Bill by Edwin Z. Albright against Amos Stockhill

and others to set aside and rescind an exchange of properties on the ground of fraud. From a decree for plaintiff, defendants appeal. Modified.

Hawley & Eldred, for plaintiff.

Hatch, McAllister & Raymond and *Ellis & Ellis*, for defendants.

STONE, J. This case is here upon the appeal of defendants from a decree for the plaintiff in the court below. The plaintiff and the principal defendant, Amos Stockhill, traded properties. The bill was filed to set aside and rescind such exchange on the ground of fraudulent representations made by the said defendant Stockhill to the plaintiff, for the purpose of inducing such exchange; and it is claimed that such false representations were successful in inducing the bringing about the exchange of such property. The trade was consummated on March 29, 1917. Under the agreement for exchange the plaintiff was to convey his equity, or interest in a farm in the township of Lyons, Ionia county, consisting of 124 acres, which he valued at the sum of \$12,400, subject to an incumbrance of \$7,225, together with the personal property on said farm, including livestock, agricultural implements, hay, etc., valued by him at about \$2,900, for a grain elevator, warehouses, electric light plant, and implement business and stock in trade connected with and incident to such business and plants, located at Conklin, Ottawa county, belonging to the said defendant Stockhill—the stock in trade consisting of agricultural implements, flour, feed, etc. The value of the real estate, including elevator and warehouses and a small building on railroad property, and the electric light plant, were in the contract at \$8,775. In this deal said defendant Stockhill was also to sell and deliver his stock in trade to the amount of \$1,500; and

if the stock exceeded in value, upon inventory at cost price, the sum of \$1,500, the plaintiff was to pay for the difference in cash, or in promissory notes.

The specific charges of fraud in the bill of complaint are as follows:

"That said Stockhill at said time and place falsely represented, stated and claimed, with the intent to cheat and defraud this plaintiff, that practically the only expenses involved in running the said electric light plant consisted of the fuel used therefor, and that the cost of such fuel would not then and there exceed the sum of \$30 per month, and that the income from said plant was at that time the sum of \$90 per month."

Also that:

"Said defendant Stockhill falsely and fraudulently stated, claimed and represented to this plaintiff, and in his presence and hearing, that said stock in trade was entirely free from incumbrances, and that the same were fully paid for and that no claims or debts existed against the same."

The bill also charges as follows:

"This plaintiff further alleges that he believed said false and fraudulent statements and representations so made as aforesaid by said defendant Amos Stockhill, and relied thereon and was deceived thereby; that, in reliance upon said false and fraudulent statements and representations, he purchased or exchanged for said grain elevator, electric light plant, agricultural implement business and stocks in trade of the said defendant Stockhill, and gave and delivered therefor his said property aforesaid, and without complying or requiring said Stockhill to comply with the laws of this State, and particularly with the statute known as the 'bulk sales law' of this State, in purchasing or exchanging for said merchandise stock in trade of said defendant Stockhill; that, in truth and in fact, it required at the date of said false and fraudulent representations, to wit, March 28, 1917, at least \$55 worth of fuel to run or operate said electric light plant for

the period of one month, and that the income derived therefrom was not the sum of \$90 per month and did not average to exceed the sum of \$70 per month, and that the same was a losing and not a paying proposition, and that said merchandise stock in trade of said defendant Amos Stockhill, was not on said 28th day of March, A. D. 1917, or at any time during said negotiations fully paid for, and was not free from debt, and that there were bills outstanding against the same, and that the aggregate of said indebtedness against said merchandise stock in trade of said defendant, which was on said 28th day of March, A. D. 1917, due and unpaid was then and there the sum of at least \$2,800, and that said creditors of said defendant Stockhill now claim and insist, that this plaintiff is obligated under the laws of this State to pay the full amount of said merchandise bills, and are now claiming and insisting that by reason of his failure to comply with said 'bulk sales law,' that he, this plaintiff, shall and must pay said claims aggregating the said sum of \$2,800 and are threatening to sue this plaintiff therefor; that under those circumstances, when this plaintiff was informed that any such bills were outstanding, he called said defendant's attention to the same and requested that he attend to the payment of such bills and relieve plaintiff of any liability therefor, all of which said defendant has failed, refused and neglected to do; that this plaintiff is advised that he may be liable for the payment of such claims unless relieved by the order and decree of this court on account of such fraud practiced upon him by said defendant, and that thereby this plaintiff has been greatly wronged, cheated and defrauded by said defendant Amos Stockhill."

As showing the theory upon which the case was heard in the court below, we quote somewhat at length from the written findings of the learned circuit judge, as contained in the record:

"The testimony of the plaintiff is to the effect that this transaction and exchange was made and entered into by himself and the defendant Stockhill, and that although defendant Emmons was then and there a co-

partner in said business he did not figure in said transaction; that said Stockhill claimed to be the owner of the property, and at the first meeting at Conklin, stated and represented to the plaintiff that the personal property which he proposed to exchange would be free and clear from all incumbrance at that time that such exchange was actually consummated; that on the 29th day of March, 1917, when said exchange was actually consummated and the property delivered from the one to the other, the defendant Stockhill represented that said personal property was free and clear from all and every incumbrance, that there was nothing against it; that the said plaintiff believed such representations and relied upon them in making such exchange, and would not have made such exchange had he not believed said representations.

"A bill of sale was given by Stockhill to plaintiff of the personal property, and contains the following statement:

" 'And for the purpose of making this sale to first party hereby represents that the property hereby conveyed is free and clear from all and every incumbrance whatever.' "

"It appears upon the trial, from Stockhill's admissions, that the bill of sale was fully understood by him, it having been read over to him carefully. Upwards of \$2,200 worth, according to the inventory value thereof, of merchandise, stock in trade and fixtures, was included in this bill of sale. It further appears that at the time defendant Stockhill was indebted upon unsecured indebtedness in the sum of nearly \$7,000.

"It is the claim of the plaintiff, in view of this indebtedness and the provisions of the bulk sales law of this State, the representations of defendant Stockhill that this personal property was free and clear from all incumbrance and that there was nothing against it was false and fraudulent and known to the said Stockhill to be so. Plaintiff also claims he had a right to believe and suppose by said representations in such bill of sale that he was obtaining by means of this exchange an absolute title to this personal property.

"Much argument was had upon the hearing of the

effect of the bulk sales law, as to whether it was an incumbrance or not. In that respect I conclude and find that third persons by the way of being creditors under the statute had a right or interest in this property; that they had a paramount right to the plaintiff, and that instead of having an absolute title the plaintiff, in view of the fact that a large indebtedness existed against the defendant and by the admitted conveyance of said personal property, its effect was to make the plaintiff a trustee for the benefit of creditors and not an absolute owner of the stock free and clear from incumbrance. The ordinary understanding of the word 'incumbrance' would signify that it was a burden, or a right of some third party against the property.

"In this case the defendant Stockhill knew well of his indebtedness to creditors in relation to said stock. It appears from the evidence that plaintiff knew nothing of such indebtedness. In my judgment, he had a right to rely upon such statement of its being free from incumbrance, and in receiving a bill of sale containing this language that he was getting title; that there was no burden imposed upon the same, and that no other parties had superior rights to his. Stockhill was in possession of the facts, the other man was not. As to this there can be no question but that a fraud was committed by the defendant. The only incumbrance that was mentioned as an exception to the representations was a certain real estate mortgage of about \$2,700. Stockhill well knew that plaintiff had to rely upon him to ascertain the true condition of affairs.

"It is urged by the defendant that because he was guilty of not having an inventory prepared and requiring a list of the creditors he was guilty of a wrong and therefore could not recover in this case even though Stockhill might have been guilty of misrepresentations. It would hardly do to hold that such would be the law under the circumstances shown in this case. Were both parties in possession of all the facts this rule might obtain. So I find that the contention of the plaintiff has been sustained by the proofs, defendant is guilty of fraud and giving to the plaintiff the right of rescission."

An examination of this record shows that both the plaintiff and the principal defendant Stockhill were men of considerable business experience. They both had a good opportunity to examine each other's property, and apparently both parties were anxious to make the exchange. When they dealt, neither paid any attention to the "bulk sales law," and they both testified that they did not know that there was such a law in existence. We are satisfied that the whole reason and cause of this suit was the fact that the parties neglected to comply with that law. Conceding that there was evidence to support the finding of the learned circuit judge, there is no evidence or claim that any inquiry was made by the plaintiff, or representations made by the principal defendant Stockhill, as to the amount of the latter's debts, or of the debts of Stockhill and Emmons, for Stockhill seems to have represented both himself and Emmons in the deal.

The case seems to have been tried and decided in the court below wholly upon the theory that because defendant Stockhill warranted this property free from all incumbrances as stated in the bill of sale, that that included and satisfied the "bulk sales law." Sections 1 and 3 of the "bulk sales law," being sections 6346 and 6348 of the Compiled Laws of 1915, are so accessible and familiar to all that they need not here be inserted. These statutes have been the law of this State since 1905, and their provisions have been repeatedly considered by this court. The learned circuit judge seems to have been of the opinion that the defendant Stockhill, alone, was responsible for the condition of the parties, and he sought to place them *in statu quo*.

We are met at the threshold of the case with the claim of the defendants that the case is controlled by, and should be disposed of upon the authority of, *Farrar v. Lonsby Lumber & Coal Co.*, 149 Mich. 118, and that

the parties having both acted in violation of the law, the appellee does not come into court with clean hands, and hence cannot prevail. It should be borne in mind that the instant case presents a situation of failure of consideration to the extent of the value of the stock in trade and fixtures sold by defendant Stockhill to the plaintiff. The consideration by reason of the debts existing against the stock in trade and fixtures exceeding their value, is so grossly inadequate as to shock the conscience of a chancellor. The "bulk sales law" was enacted for the purpose of preventing frauds by debtors upon creditors, and the purpose of the act is to protect the creditors. A careful examination of the question satisfies us that the whole trend of our decisions, as well as the decisions of other courts construing statutes similar to ours, is to the effect that the purpose of this and similar acts is to protect creditors, and that a sale made in violation of the statute is void only as to creditors. *Spurr v. Travis*, 145 Mich. 721 (9 Ann. Cas. 250); *Musselman Grocer Co. v. Kidd, Dater & Price Co.*, 151 Mich. 478; *Coffey v. McGahey*, 181 Mich. 225, 232; *Squire v. Tellier*, 185 Mass. 18 (69 N. E. 312).

Such sale as between the seller and buyer is valid; but if the seller has been guilty of any fraud to the injury of the buyer, or if there has been a grossly inadequate consideration, such as is above described, the seller cannot hide behind the statute and thus avoid liability to the purchaser. What was held in *Farrar v. Lonsby Lumber & Coal Co.*, *supra*, is that a sale void as to creditors cannot, as between the parties, be made to operate to give the vendee a lien for the money he has paid. The remedy sought in that case was against the property (or the proceeds of it) sold in violation of the "bulk sales law."

In the case at bar the relief sought by the plaintiff does not affect the rights of creditors of the seller of

the goods, but is aimed at a recovery from the seller of the property in exchange for the goods. Here, confessedly, is a void sale as to creditors of a stock of goods and fixtures, and the plaintiff turned over his farm and the stock thereon in payment. The creditors of the vendor have taken steps to secure their rights. It is conceded that the debts of defendant Stockhill exceed the value of the stock of merchandise and fixtures pertaining to the conducting of said business. The question lies wholly between the vendor and the vendee, and does not affect the creditors at all, and the doctrine that one must come into a court of equity with clean hands in order to obtain relief has, in our opinion, no application here. While we do not think that a case for rescission of the entire contract has been made out by the evidence in the case, still it would be most inequitable to compel the plaintiff to lose the entire value of the stock in trade and fixtures, where the creditors are subjecting such property to the payment of their claims. We do not think that the *Farrar Case* stands in the way of granting some relief to the plaintiff. Of course it is understood that though the purchaser of a stock of goods in bulk did not comply with the "bulk sales law," he does not become liable for all of the debts of the seller, but only for the seller's debts so far as they can be satisfied out of the stock of goods and fixtures of which he is held to be the receiver for the benefit of the seller's creditors. As we have said, this legislation was intended for the protection of creditors. It may be said that the goods, as to his creditors, belong to the seller, and the vendee is a receiver accountable to such creditors for all the goods and fixtures that have come into his possession by virtue of such sale. In other words, the sale was absolutely void as to creditors. Mere inadequacy of consideration, unless it is so gross as to shock the conscience of a chancellor, is not, itself,

a ground on which specific performance of the contract will be refused, or one on which a contract will be rescinded. 9 Cyc. p. 367. The rule has been stated to be that where the consideration is so grossly inadequate as to shock the conscience, courts will interfere, although there has been some exercise of judgment by the parties fixing it. 6 R. C. L. § 86, p. 679. No contract of sale, valid as to creditors of the seller, can be entered into unless the requirements of this statute are complied with.

We have examined this case with great care to determine whether it is one for the rescission of the entire contract; or a case in which the plaintiff shall have relief to the extent that the consideration has failed. As between the seller and buyer, it is as though the title to the stock in trade and fixtures had failed. With the exception of the stock in trade and fixtures, these parties seem to have dealt at arm's length. Both were men of experience in business. The properties were thoroughly examined before the trade was made. The plaintiff not only had the opportunity, but did examine the property which he purchased. When he asked as to the earnings of the electric light plant he was referred to the bookkeeper, who answered his questions. No fault was found by the plaintiff with any portion of the property, except the stock in trade and fixtures, for more than four months after the trade was consummated. He had learned that the statute had been violated. In the meantime plaintiff was in possession of the property purchased, making such changes as he saw fit to make, selling the warehouse, offering the entire property for sale, and finally, when he filed his bill, he made complaint only as to the stock in trade and fixtures, and as to the expense of running the electric light plant.

Upon the hearing there was some testimony offered by the plaintiff tending to show that the other property

which defendant Stockhill traded was not of the value represented by him. Both of the parties had a good opportunity to examine each other's property and to determine what there was in it, and they both took advantage of that opportunity. It is conceded by plaintiff's counsel that the bill of complaint is not broad enough to cover this point, but it is urged that under the practice there is no reason why this court should not amend the bill of complaint in the furtherance of justice. We recognize the rule that counsel here suggests, but we are of the opinion that under the evidence there were no such representations as to the value of the property made by the defendant Stockhill as in any way tended to the prejudice of the plaintiff. The plaintiff was a man of affairs and exercised his own independent judgment, as shown by the evidence in the case. The mere fact that Stockhill had listed the property at a lower price would not preclude him from increasing the price in the case of a trade; and the statement as to the value of the property would not be such a false representation as could be made the basis of a rescission of the contract. Mere expressions or matters of opinion as to values, upon which men might fairly and honestly differ, cannot be made the basis of fraudulent representations. *Collins v. Jackson*, 54 Mich. 186; *Buxton v. Jones*, 120 Mich. 522; *Hammer v. Martin*, 205 Mich. 359, and cases there cited; 20 Cyc. p. 52.

Upon the other question as to the representation of the cost of operating the electric light plant and the income from the same, the evidence does not support the claim of the plaintiff and he has not sustained the burden of proof in that regard. What we have just said does not apply to the sale of the stock in trade and fixtures connected with the business. While the condition existing as to the debts of the seller did not make such an incumbrance upon the property as to

violate the clause in the bill of sale, that it was free from incumbrance, yet, in a sense, it may be said, and as would doubtless be understood by laymen, the title to the property was not clear as to creditors, and the defendant Stockhill could not convey title to it to the plaintiff to the injury of the former's creditors. In any view of the case, we come back to the proposition that as to the debts of defendant Stockhill and their relation to the stock in trade and fixtures, the facts were not disclosed to the plaintiff. Whether the withholding of this information of the amount of defendant Stockhill's indebtedness was intentional on his part, or was withheld simply in ignorance of the law, the fact still remains and cannot be controverted, that there has been as to the stock in trade and fixtures such a failure of consideration, amounting to gross inadequacy of consideration, when the whole trade is considered, as calls upon a court of equity to grant the plaintiff some relief.

We do not think the plaintiff, when he filed his bill, in view of all his conduct with reference to this property, was in a condition where he could properly ask a court of equity to rescind the entire contract; but we do think that he was in a position, upon the facts stated and evidence introduced relating to the stock in trade and fixtures, to ask some relief from the court; and we think the court should retain jurisdiction and grant such relief. It is conceded by defendant's counsel that, if the plaintiff paid out money for Stockhill and Emmons, he might in an action at law collect it as money paid for the use of Stockhill, or he might recover it of Stockhill as a balance, under the facts, due him on the sale. We do not think it is necessary to send the plaintiff into a court of law for this relief. The stock in trade and the fixtures constitute an entire loss to the plaintiff. We take it that there is no question about that, as to the amount. If there is any

question, it can be settled by an accounting in this case upon a remand to the circuit to take further proof. To the extent that plaintiff has suffered and been damnified, or shall be damnified, he is entitled to relief against the defendant Stockhill and may have a lien for such sum upon the farm in Ionia county. *Carroll v. Rice*, Walk. Ch. 373; *Merrill v. Allen*, 38 Mich. 487; *Merrill v. Wilson*, 66 Mich. 232; *Lefevre v. Chamberlain*, 228 Mass. 294 (117 N. E. 327).

We invite especial attention to the rule as stated in *Merrill v. Allen*, *supra*, where it is held that the existence of a legal remedy will not prevent resort to equity to have the agreed consideration, or the value of the premises out of which the complainant had been cheated, declared an equitable lien on the lands sold. It is there said:

"The mere fact that the person defrauded might have a remedy at law would not deprive him from coming into a court of chancery and having the agreed consideration, or value of the premises, declared to be an equitable lien upon the lands."

Here, under the general prayer for relief, we have no doubt of the power of the court of equity, and of this court, to grant relief to the plaintiff to the extent that he has been damnified, or will be damnified by reason of the failure of the consideration as to the stock in trade and fixtures.

In *Merrill v. Wilson*, *supra*, where fraud had been practiced by the defendant, and the plaintiff, by reason of his dealing with the property, was not in position to ask rescission, this court held that he was entitled to enforce a vendor's lien for the unpaid purchase money, his bill stating a case upon which such relief could be based.

The case should go back to the circuit court, in chancery, and evidence should be taken showing the value of the stock in trade and fixtures connected with

the business, and the extent to which the plaintiff had been damnified, or shall be damnified by payment, by reason of the suits in garnishment, or otherwise, against him as receiver for this stock of goods and fixtures; and he should have a decree for that amount, which should stand as a lien against the said farm in Ionia county, and in the nature of a vendor's lien.

Questions as to the claimed exemption of any portion of this property, if such are involved, can be disposed of in such accounting. We express no opinion upon the subject of exemptions from execution of any part of this property, as the subject has not been briefed or argued, but the question may be dealt with in the accounting. *McCormick v. Kistler*, 175 Mich. 422 (45 L. R. A. [N. S.] 497).

The injunction granted in the 11th paragraph of the decree below as to selling, incumbrancing, mortgaging, or otherwise disposing of the said defendant Stockhill's interest in the farm in Ionia county will be continued in force.

A decree will be entered in accordance with this opinion; and as neither party has fully prevailed in his claim, no costs will be allowed in either court, but each party shall pay one-half the expense of printing the record. Decree below modified.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

WASHTENAW MUTUAL FIRE INSURANCE CO. v. BUDD.**1. INSURANCE—FIRE INSURANCE—ACTION AGAINST WRONGDOER.**

Where insured has sustained a loss, he is not required to invite the insurer to take part in an action against the wrongdoer, nor to take any special steps to protect the insurer; but it is the insurer's privilege to intervene and protect his own rights, if he sees fit to do so, under 3 Comp. Laws 1915, § 12362.

2. SAME—SUBROGATION OF INSURER TO JUDGMENT AGAINST WRONGDOER—VALUED POLICY.

Where the total amount received by the insured from the insurer and the wrongdoer, after deducting attorney's fees and costs, did not exceed the value of the property destroyed, the insurer was not entitled to subrogation against the insured to the judgment recovered against the wrongdoer, although the policy was a valued policy, it appearing by its terms that the insurance was only two-thirds of the estimated value.

Appeal from Washtenaw; Sample (George W.), J. Submitted October 14, 1919. (Docket No. 41.) Decided December 23, 1919.

Bill by the Washtenaw Mutual Fire Insurance Company against Norris Budd, executor of the last will of Abraham D. Budd, deceased, and the Ann Arbor Railroad Company for subrogation to the amount of a judgment against defendant company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Frank E. Jones, for plaintiff.

Arthur Brown and *John P. Kirk* (*E. R. Sunderland*, of counsel), for defendant Budd.

STONE, J. The bill of complaint herein was filed to obtain a subrogation of plaintiff, and to reach cer-

On right of insurer which has paid the loss as against insured who has recovered against or settled with third persons responsible for the loss, see note in 41 L. R. A. (N. S.) 719.

tain moneys collected by Abraham D. Budd from the Ann Arbor Railroad Company, and that said Budd be decreed to be the trustee of the plaintiff. The salient facts were substantially as herein stated. The plaintiff is a Michigan mutual fire insurance company, with offices at the city of Ann Arbor. For a number of years Abraham D. Budd had been a member of said plaintiff company, and had insured, in accordance with the charter and by-laws of said company, certain property, of which he was the owner, under policy No. 1,261, situated on section 21 in the township of Pittsfield, county of Washtenaw, mentioned in the policy, for the following amounts: \$900 on dwelling house No. 1; \$200 on household furniture, etc.; \$300 on barn and shed; \$300 on barn No. 2; \$100 on granary; \$700 on farm products, farm implements, carriages and livestock in Washtenaw county, subject to all the terms and conditions of the policy. The policy stated that the "amount insured represented $\frac{2}{3}$ of estimated value." The relevant by-laws of the plaintiff were as follows:

"7. This company will not insure property for more than two-thirds its cash value. The directors of the company to be the judges of such valuation."

"10. In case of loss or damage to personal property insured, the company is liable for two-thirds of such loss or damage, provided full value of the property lost or damaged, as appraised by the directors, does not exceed the estimated cash value of the personal property insured in the policy of the loser in the respective class in which the loss occurs."

While said insurance was in force, on the 23d day of September, 1916, one barn and shed \$300, one barn No. 2 \$300, one granary \$100, were destroyed by fire, with certain personal property which was covered by said policy of insurance of the value of \$456.75. The loss as adjusted by the plaintiff company—the full amount of the insurance on the buildings (\$700) and

two-thirds the value as fixed on the personal property (\$304.50), making in all \$1,004.50. This amount was on the 26th day of September, 1916, paid by plaintiff company to Abraham D. Budd (since deceased). Soon after this payment and about December 5, 1916, the said Abraham D. Budd, the insured, without consultation with any of the officers or representatives of the plaintiff, began suit for the recovery of damages to his buildings and property by fire, against the Ann Arbor Railroad Company, alleging that the fire was caused by the negligence of said railroad company. On June 7, 1917, he recovered a judgment against the said railroad company for said damages in the sum of \$1,000 and costs, which judgment was afterwards affirmed by this court. See *Budd v. Railroad Co.*, 200 Mich. 250.

While said case was pending upon appeal, this bill of complaint was filed, and an injunction issued restraining the payment or collection of said judgment until the further order of the court; also praying for subrogation, as above stated, to the claim or judgment against said railroad company to the amount which the plaintiff, as insurer, had paid to said Budd under said policy.

Pending the instant case, and after the same was at issue, Abraham D. Budd died testate, and Norris Budd, executor, was permitted to come in and defend in this case. A motion was then made for dissolution of the injunction so that the defendant should be permitted to collect the judgment, which had been affirmed in this court, and this was granted upon the filing of a bond by defendant, and the judgment against the railroad company has since been collected by the executor, so that the Ann Arbor Railroad Company is no longer an interested party in this case. A hearing was had before the trial court, and an opinion rendered by the circuit judge in which it is stated that inasmuch as

the amount received by the defendant was not sufficient to cover, net to defendant, the amount of damage and loss he had suffered, the plaintiff was not entitled to a decree, and the bill or complaint was dismissed with costs. The opinion of the learned circuit judge is so brief and pointed, and upon the facts found so accords with our view of the evidence, that we insert the same here in full:

"This is a suit in equity in which the plaintiff seeks to recover as a trust fund certain moneys which the defendant, Abraham D. Budd, obtained as damages from the Ann Arbor Railroad Company, for the loss of his property caused by sparks from a locomotive of the railroad company. It appears that defendant, Abraham D. Budd, on September 23, 1916, was the owner of certain buildings and personal property located on a farm near the right of way of the Ann Arbor railroad in this county. Part of his property was, at that time, insured in the plaintiff insurance company. On that day, a considerable part of this property was destroyed by fire, caused by sparks from a locomotive belonging to the Ann Arbor Railroad Company. After the fire, the plaintiff settled with defendant Budd for this loss under its policy of insurance, appraised the property and paid to the defendant Budd \$1,004.50, which was two-thirds of the value of the property loss on the insured property, and was the amount for which the insurance company was liable under the terms of its policy.

"Afterward, defendant Budd brought an action against the Ann Arbor Railroad Company for negligently causing the loss of his property by fire, and recovered a judgment against the railroad company for \$1,000 which was paid. The plaintiff insurance company now seeks to obtain this money on the grounds that since it settled with the defendant Abraham D. Budd for the loss, under its policy of insurance, it is entitled to be subrogated to the entire claim of the defendant against the railroad company. It is conceded that the amount received from the railroad company after deducting the attorney's fees and paying the costs, was \$523.17. The plaintiff does not

question the reasonableness of the fees charged by the attorney for trying the case in the circuit court and carrying through the appeal in the Supreme Court, and I see no occasion for questioning their reasonableness.

"The total net compensation which defendant Abraham D. Budd received for the loss of his property was, therefore, \$1,527.67, made up of the two items of \$1,004.50 from the plaintiff insurance company, and \$523.17, net recovery from the railroad company. The value of the property destroyed by the fire appeared from the plaintiff's own evidence, to be \$1,682, though the defendant's evidence tended to show a much greater value. But on the plaintiff's own showing, defendant Abraham Budd received from all sources \$154.50 less than the amount he actually lost by the fire.

"The law, on the point here involved, has been very clearly laid down by the supreme courts of several States, although the exact question has not been directly passed upon in this State, and I think the principle is to be considered well settled. As said by the supreme court of Kansas, in a recent decision, *Shawnee Fire Ins. Co. v. Cosgrove*, 86 Kan. 374 (121 Pac. 488, 41 L. R. A. [N. S.] 719):

"The general rule is unquestionably that the insurer can recover from the insured, of the sum of insurance paid upon its policy, only the excess received from the wrongdoer, after full compensation for his loss, including the costs and expenses thereof."

"To the same effect is *Svea Assurance Co. v. Packham*, 92 Md. 464 (48 Atl. 359, 52 L. R. A. 95).

"Applying this rule of law to the case before me, there is nothing to be turned over to the plaintiff insurance company. The plaintiff is entitled only to the excess which the defendant received from it after full compensation for his loss, including costs and expenses. This loss was, on plaintiff's own showing, \$1,682, and his total receipts, after deducting costs and expenses, were only \$1,527.67. The defendant still lacked \$154.50 of being fully compensated for his loss, and, therefore, the plaintiff has no valid claim against Abraham Budd.

"A decree may, therefore, be entered in accordance

with the foregoing opinion and the bill of complaint of the plaintiff in this cause dismissed, with costs to be taxed against the plaintiff."

The plaintiff has appealed from the decree entered in pursuance of the opinion, and it is its claim that the right of the insurance company to be subrogated is a recognized ground of equitable relief. There is no question raised by defendant that, under the authorities, the plaintiff, as insurer, would have a right to be subrogated as to any excess over the loss sustained by the insured; but it is the claim that, inasmuch as nothing more than sufficient has come to the hands of defendant, by both the amount paid by the insurance company and the amount recovered from the railroad company, to cover his loss, there is nothing which the plaintiff can take. The general doctrine of the right of subrogation is not questioned by the defendant. In fact such right was recognized by this court in *Union Ice Co. v. Railway Co.*, 178 Mich. 346, 352.

An examination of the authorities cited by counsel upon both sides has satisfied us that the learned circuit judge reached the correct conclusion upon the facts found by him, which facts, we think, are fully sustained by the evidence. It is conceded by the plaintiff's attorney that \$176 worth of property that was not insured at all was destroyed, and was included in the judgment against the railroad company.

Stress is laid by plaintiff's counsel upon the absence of the insurer from the litigation against the railroad company. We think that the evidence shows that the company had knowledge of such litigation. We understand the rule to be that the insured is not required to invite the insurer to take part in an action against a wrongdoer, nor to take any special steps to protect the insurer; but it is the insurer's privilege to intervene and protect his own rights, if he sees fit to do so.

Our statute now fully provides for such intervention; but it provides that "intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding." Judicature Act, chap. 12, § 11 (3 Comp. Laws 1915, § 12362). The cases cited by the circuit judge in his opinion, we think, fully sustain his position.

The claim is put forward by plaintiff's counsel that the policy here was a valued policy, and *North of England Iron S. S. Ins. Ass'n v. Armstrong*, L. R. 5 Q. B. 244, is cited and quoted from as follows:

"We are satisfied that our judgment must be in favor of the plaintiffs; and I ground my judgment upon the general proposition that where the value of the thing insured is stated in the policy in a manner to be conclusive between the two parties, the insurer and the insured, as regards the value, then in respect of all rights and obligations which arise upon the policy of insurance, the parties are estopped between one another from disputing the value of the thing insured as stated in the policy."

It is conceded by defendant's counsel that probably the policy here involved was a valued policy so far as the buildings were concerned, but was an open policy as to the personal property, and it is contended that this can make no difference with the result of this case upon the facts found, it appearing that the amount insured represented only two-thirds of the value.

As opposed to the English doctrine as indicated in the case last cited, counsel for defendant call attention to *The Livingstone*, 65 C. C. A. 610, 130 Fed. 746, where the United States circuit court of appeals for the second circuit deals with this question and disapproves the English rule. It was held there that an insured who had been paid for a total loss, according to the valuation in a valued policy, could recover the real value of the property from the wrongdoer who caused the loss, and could retain everything recovered in ex-

cess of the valuation in the policy paid by the insurer. In other words, the court held that a valued policy did not prevent the insured from recovering and retaining more than the valuation named. The Federal court there referred to the *Armstrong Case*, and said:

“That decision carries no greater weight in this country than is compelled by the force of its reasoning, and, after careful consideration, we are unconvinced by its logic and are unable to accept its conclusions.”

It also appears that the *Livingstone Case* was approved by the Supreme Court of the United States, to the extent of denying a writ of certiorari to review it. See 194 U. S. 637 (24 Sup. Ct. Rep. 860). We think the *Livingstone Case* states the better doctrine. What plaintiff really claims is that this policy was a valued policy in the sense that the property was valued at the same amount as the indemnity. But the policy by its terms expressly negatives such a valuation, when it says that the amount insured represents two-thirds of the estimated value.

We are so fully in accord with the views expressed by the learned circuit judge that we think the decree below should be affirmed, with costs to the defendant. It is so ordered.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

VEENSTRA v. DEGOLIA.

PARTNERSHIP—ACCOUNTING—EVIDENCE—SUFFICIENCY.

In a suit for a partnership accounting, the decree of the court below in favor of plaintiff, *held*, justified by the record.

Appeal from superior court of Grand Rapids; Dunham (Major L.), J. Submitted October 15, 1919. (Docket No. 52.) Decided December 23, 1919.

Bill by Jelle Veenstra against William E. DeGolia to restrain an action at law and for an accounting. Defendant filed a cross-bill for an accounting. From a decree for plaintiff, defendant appeals. Affirmed.

Smedley & Linsey, for plaintiff.

Hartley E. Hendricks and *John M. Dunham*, for defendant.

STONE, J. Bill for an accounting and for an injunction. The plaintiff, the defendant, and one H. J. DeGolia, entered into a copartnership, for the purpose of conducting a general real estate business in the city of Grand Rapids and vicinity. This partnership continued from about May 16, 1917, to December 1, 1917. On May 10, 1918, defendant had plaintiff arrested on a writ of *capias ad respondendum*. On May 24, 1918, the writ was dismissed by the circuit court. On the same day defendant caused to be issued out of said court a second writ of *capias*, wherein it was claimed that this complainant was indebted to this defendant by reason of certain fraudulent acts, growing out of certain of their partnership transactions. Thereupon, plaintiff filed this bill of complaint in the superior court of Grand Rapids, in chancery, asking for an ac-

counting of certain partnership dealings, and for a decree for whatever sum was found to be due him upon such accounting. He offered to pay defendant any sum that the court found due and payable to him upon such accounting. Plaintiff further asked that defendant be enjoined from prosecuting the *capias* case in the circuit court. Defendant filed his answer in the nature of a cross-bill, and asked that the court decree that plaintiff was indebted to him upon certain partnership transactions. The case was heard upon pleadings and proofs taken in open court. The testimony, consisting of about 100 pages of the record, involves various and complicated dealings of the parties, and a reading of it satisfies us that an extended discussion of it would serve no good purpose, as questions of fact only are involved.

The learned trial judge, who heard the case, filed a written opinion which clearly and concisely states the facts found, sufficient for an understanding of the questions involved, together with his conclusions thereon. We find ourselves so fully in accord with his findings and conclusions that we adopt the same. It is as follows:

"FINDINGS OF FACT.

"The parties to this suit, together with one H. J. DeGolia, were copartners from about the 16th day of May, 1917, to the first day of December, 1917, as general real estate dealers, and that they were to share and share alike in the profits and expenses as such copartners. That neither William E. DeGolia or H. J. DeGolia paid any office rent during that period, the whole of it being paid by plaintiff at the rate of \$15 per month, excepting during the time that one Kinney had desk room therein, and during which time he paid five dollars (\$5) per month therefor. Plaintiff paid the telephone rental of eleven dollars and fifty cents (\$11.50) less about two dollars and eighty-seven cents (\$2.87), paid by said Kinney, and the expenses of running said real estate office during the time of said

copartnership was five hundred and seventy-six dollars and forty-one cents (\$576.41) all of which was paid by the plaintiff with the exception of twenty-five dollars (\$25), that is to say, that plaintiff paid of such expenses five hundred and fifty-one dollars and forty-one cents (\$551.41). Defendant here is chargeable with one-third thereof and interest amounting to one hundred ninety-four dollars and fifty-five cents (\$194.55).

"I find the defendant here, William E. DeGolia, is indebted to plaintiff for borrowed money, the sum of four hundred and ten dollars and two cents (\$410.02). This amount includes seventy-five dollars (\$75) borrowed from the Kent State Bank. The two notes given to said bank for that amount, one for the loan and one in renewal thereof, I find was borrowed for and paid to the defendant by plaintiff. I come to this conclusion from the fact that from almost the very beginning of said copartnership, defendant was continually borrowing money of plaintiff, borrowing one hundred dollars (\$100) on May 4th, 1917; eighteen days thereafter, he borrowed another one hundred dollars (\$100) of plaintiff; on August 21st, he borrowed another one hundred dollars (\$100), and I have no question but what he borrowed the seventy-five (\$75) of the bank on August 8th, 1917, as plaintiff claims, and that to get it, it was necessary for plaintiff to give the note as he did. I am led to this conclusion of the continual borrowing of defendant from plaintiff and from the fact that the first or canceled note upon this trial was found to be in the possession of the defendant.

"The automobile that was used in this copartnership business was bought and paid for by the plaintiff; neither the defendant nor the other copartner, H. J. DeGolia, ever paid any part of said purchase price. Neither do I find that by any exchange of equity in any real estate by the two DeGolias to the plaintiff for an interest in said automobile, as claimed by them, is true. The automobile is now the property of the plaintiff, as it always has been.

"Defendant collected three hundred and thirty-four dollars (\$334) from Roy J. Bennett at an expense of twelve dollars (\$12), one-third of this amount and

interest amounting to one hundred and fourteen dollars and eight cents (\$114.08) is the amount thereof that defendant owes the plaintiff.

"On the Allendale farm deal, so-called, plaintiff paid to the Coopersville bank the sum of one thousand and eighty-nine dollars and forty-six cents (\$1,089.46). Plaintiff received from one Klant in exchange for the Coit estate property, five hundred dollars (\$500). Defendant put no money into this proposition; plaintiff acquired the title to the Coit estate property; there is a mortgage thereon of eleven hundred dollars (\$1,100) and it cost plaintiff fifty-seven dollars (\$57) in paying back payments and commissions on said loan.

"Plaintiff claims that this property is worth not to exceed eighteen hundred dollars (\$1,800), and in open court offered to have it deeded to the defendant for eighteen hundred dollars (\$1,800) now or at any time within six months; plaintiff claims that the equity in this property is seven hundred dollars (\$700) or the difference between eighteen hundred dollars and eleven hundred dollars, or seven hundred dollars, but in order to acquire this title and that loan, it cost plaintiff fifty-seven dollars (\$57). There is no question but what this property belongs to the parties to this suit, although the title is in the plaintiff's daughter. At the time plaintiff made this deal, he was a copartner of the defendant, and was defendant's agent in respect to any copartnership property or matters. Deducting the fifty-seven dollars from the seven hundred dollars (\$700), leaves a balance of six hundred and forty-three dollars (\$643) in said property belonging to the parties to this suit.

"The plaintiff in his transactions with the Coopersville bank, concerning the Allendale farm, put into that property five hundred and eighty-nine dollars and forty-six cents (\$589.46) over and above the five hundred (\$500) that he received from said Klant; one-half of this five hundred and eighty-nine dollars and forty-six cents (\$589.46) is chargeable against defendant, while defendant is entitled to one-half of six hundred and forty-three dollars (\$643) which plaintiff owes defendant, being three hundred and twenty-one dollars and fifty cents (\$321.50), while defendant owes plaintiff one-half of five hundred and eighty-nine dol-

lars and forty-six cents (\$589.46), which amount is two hundred and ninety-four dollars and seventy-three cents (\$294.73), and the difference between these two amounts is fifty-three (\$53) dollars, one-half of which belongs to the defendant, amounting to twenty-six dollars and seventy-seven cents (\$26.77), which plaintiff should be charged with. Plaintiff also received rent from the Allendale farm while it was in his charge of one hundred and forty dollars (\$140); one-half of this belongs to the defendant, or seventy dollars (\$70).

"Plaintiff also received twenty-five (\$25) commission on a team of horses; one-third of this belongs to the defendant, which is eight dollars and thirty-three cents (\$8.33). Eight dollars and thirty-three cents (\$8.33) plus seventy dollars is seventy-eight dollars and thirty-three cents (\$78.33) and interest thereon which is four dollars and sixty-six cents (\$4.66), makes a total of eighty-two dollars and ninety-nine cents (\$82.99), and is chargeable against plaintiff.

"With reference to the Bridge street rooming house, plaintiff paid thirty-seven dollars and fifty cents (\$37.50) in relation thereto. Its value is three hundred and fifty dollars (\$350); deducting \$37.50 from this \$350, leaves three hundred and twelve dollars and fifty cents (\$312.50), one-third of which belongs to the defendant, and amounts to one hundred and four dollars and twelve cents (\$104.12) with interest thereon, amounting to six dollars and seven cents (\$6.07) or a total of one hundred and ten dollars and nineteen cents (\$110.19)."

"Whatever equity these copartners had in the North street property was lost to all of them in the farm transaction into which the equity in that property was traded, plaintiff losing as much as either of the other of his copartners.

"Defendant has no interest in lot eighty (80) block seventeen (17) of Sobvinski's addition. Defendant claims a one-third interest in lot four (4) of Sunny Side addition to the city of Grand Rapids. I think no one without years of experience in dealing in equities in real estate would make a claim to any interest in this lot. The title to it is in plaintiff. He made the loan to the woman by which he acquired this property, and the transaction was so unconscionable that

I should expect the plaintiff, if an honest man, not to desire to hold the title himself thereto, but the plaintiff has the title, and if in the transaction the title had gone to defendant, no court would aid the plaintiff in obtaining any interest therein. The title is in the plaintiff and so far as this court is concerned, will remain there, and the defendant should receive nothing by reason thereof, and I hold the defendant has no interest therein.

"The title to lot seventy-seven (77) of Coit Park addition is now in Jessie Vogel. Such conveyance being upon an arrangement and agreement between herself and the plaintiff here, her father. The equity in this property over and above the \$1,100 mortgage belonged to the parties to this suit as copartners, and one copartner, the plaintiff, having conveyed or had it conveyed to his daughter, Jessie Vogel, and the value of such equity having been determined in this case and defendant having been upon the accounting therein given credit for, the title thereto should be quieted in said Jessie Vogel.

"I do not feel that there is a preponderance of the evidence on the part of the plaintiff as to the small loans he testified to, amounting to ninety-two dollars forty cents (\$92.40), and I find that he has not established that claim against the defendant by a preponderance of the evidence.

"Defendant DeGolia is indebted under the evidence in this case to the plaintiff in the sum of one hundred and ninety-four dollars and fifty-five cents (\$194.55) for rent; in the sum of four hundred and ten dollars and two cents (\$410.02) for borrowed money; that defendant owes the plaintiff the sum of one hundred and fourteen dollars and eight cents (\$114.08) on account of money received by him from Roy J. Bennett, or a total of seven hundred and eighteen dollars and sixty-five cents (\$718.65).

"Plaintiff owes defendant, as shown by the testimony in this case, the following sums: Upon the Allendale farm deal, and the transactions with Mr. and Mrs. Klant, the sum of twenty-six dollars and seventy-seven cents (\$26.77); for rent from the Allendale farm and the commission on a team of horses and interest thereon, eighty-two dollars and ninety-nine

cents (\$82.99); and on the Bridge street rooming house property one hundred and ten dollars and nineteen cents (\$110.19), or a total of two hundred and nineteen dollars and ninety-five cents (\$219.95).

"Under this transaction, plaintiff is entitled to a decree against the defendant for the difference between seven hundred and eighteen dollars and sixty-five cents and two hundred and nineteen dollars and ninety-five cents, or four hundred and ninety-eight dollars and seventy cents (\$498.70) with costs to be taxed. Plaintiff has some security for some of the money loaned by him to the defendant; this security will stand until the amounts so secured have been paid.

"The preliminary injunctions issued herein against defendant from prosecuting the case or cases commenced by him against plaintiff in the Kent county circuit court, will, by decree granted herein, be made perpetual. A decree may be prepared in conformity with this opinion."

A decree was entered accordingly, which is affirmed, with costs to plaintiff.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

O'DELL v. STRAITH.

1. TRIAL—REQUESTS TO CHARGE COVERED BY GENERAL CHARGE.

Where the substance of requests to charge was given in the general charge, there was no error in refusing such requests.

2. SAME—EVIDENCE—ARCHITECTS—CONTRACTS—CONVERSATION WITH DISINTERESTED PARTY.

In an action by a firm of architects for services in preparing plans and specifications for the construction of a
308—Mich.—32.

building which was never erected because of difficulty in financing same, testimony of defendant as to an interview with a former member of plaintiff firm, who is not a party to the suit, in so far as it related to the terms of the contract which was afterwards entered into, *held*, properly stricken out.

3. SAME—WITHDRAWAL OF QUESTION—CURING ERROR.

Asking a question of defendant's wife, on cross-examination, as to whether she had given the matter a great deal of thought during the past week in order to help win the case for her husband, which was withdrawn, on objection, *held*, not reversible error.

4. SAME—COMPROMISE VERDICT—VERDICT FOR LESS THAN AMOUNT ASKED.

Where plaintiffs sued for \$6,000 and offered testimony that their services were worth that sum, but they had rendered a bill to the defendant of \$3,000, a verdict for \$2,500 cannot be said to be a compromise verdict, there being nothing to indicate that the jury did any "splitting of differences."

5. APPEAL AND ERROR—TRIAL—DEFENDANT CANNOT COMPLAIN OF SMALLNESS OF VERDICT.

That the verdict was less than the evidence would have justified, is a matter of which defendant cannot complain.

6. SAME—NEW TRIAL—GREAT WEIGHT OF EVIDENCE.

It is only where the verdict is clearly against the great weight of the evidence that the Supreme Court will overrule the trial court and grant a new trial.

Error to Wayne; Dingeman (Harry J.), J. Submitted October 22, 1919. (Docket No. 120.) Decided December 23, 1919.

Assumpsit by Henry A. O'Dell and Dewey Halpin, copartners as Baxter, O'Dell & Halpin, against Samuel Straith for services rendered. Judgment for plaintiffs. Defendant brings error. Affirmed.

Paul W. Voorhies and *Philip H. Robinson*, for appellant.

John McNeil Burns (*Arthur P. Hicks*, of counsel), for appellees.

STONE, J. This case was brought here by the defendant, by writ of error, to review a judgment for the plaintiffs of \$2,500. The plaintiffs were architects in the city of Detroit, and it was their claim that in September, 1916, they were verbally employed by the defendant to prepare plans and specifications, and receive bids for the erection of a certain apartment building to be erected on Hancock avenue, in said city, the construction of which they were to superintend; that in pursuance of such employment, they prepared the plans and specifications for the building, and received bids which were submitted to the defendant, and approved by him; and that on or about April 7, 1917, the defendant notified the plaintiffs that, because of the unsettled conditions growing out of the war between this country and Germany, he had decided not to go on with the building. The plaintiffs, in this suit, sought to recover what they claimed was the reasonable value of the services which were rendered by them in connection with their employment.

On the other hand, the defendant, while admitting that he employed plaintiffs to prepare the plans and specifications, claimed that it was a part of the agreement that the plaintiffs were to arrange for the financing of the construction of the building; that this was a material part of the agreement, and that without it the defendant would not have entered into the contract with the plaintiffs; that the plaintiffs did make efforts to finance the building, but were unsuccessful; that after several unsuccessful efforts to consummate some arrangement for financing the building the plaintiffs announced that they were through, or words to that effect; and it was the claim of the defendant that, because of the failure of the plaintiffs to carry out this phase of the agreement, the contract was not performed, and that plaintiffs were not entitled to recover any compensation for their services; and that the con-

tract was an entire contract, the material feature of which was the agreement of the plaintiffs to finance the construction of the proposed building.

Upon the trial the plaintiffs admitted that they made some efforts to assist the defendant to finance the construction of the building, but they claimed that their efforts in that direction were purely voluntary, and made simply with the desire on their part to see the project carried out, and that they were not obligated, under the terms of the agreement, to do anything in connection with the financing of the project.

Thus was presented to the jury a square issue of fact, and the principal issue in the case. It should also be stated that upon the trial plaintiffs claimed that by their contract with the defendant they were to be paid the regular fees of the American Institute of Architects, and that under the rules of that institute there is a regular and established charge of three per cent. of the estimated cost of the building to cover the work done by architects, including the preparation of the plans and specifications and the taking of bids; in other words, covering all the preliminary work to be done up to the time of the beginning of the actual construction of the building; and that inasmuch as all of this work had actually been done they were therefore entitled to the full three per cent. of the estimated cost of the building, or \$6,000, and that was the amount claimed in the amended declaration.

There was lengthy testimony produced by the plaintiffs upon the subject of the amount of time spent and labor bestowed in the preparation of the plans and specifications, and in the receiving of bids. There was evidence that the amount of the total bids received by plaintiffs, and approved by the defendant, was \$218,890.20, which did not include a refrigerating plant.

There was also testimony on behalf of the plaintiffs of one John M. Donaldson, an experienced architect

who had practiced his profession in Detroit for 35 years, that the value of services such as the plaintiffs claimed they had performed in preparing plans and specifications and receiving of bids, and not including superintendence of building, would be $3\frac{1}{2}$ per cent. of the total bids received; and that for such services, including full superintendence of construction, the reasonable charges would be 6 per cent.

The plaintiffs further gave testimony that the arrangement that was made between themselves and the defendant was that they were to be paid the regular fees of the American Institute of Architects, and that would be 3 per cent. or \$6,000. It, however, appeared in evidence that on June 5, 1917, the plaintiffs had rendered a bill to defendant for services rendered, \$3,000. This bill was accompanied by a letter which reads as follows:

"BAXTER, O'DELL & HALPIN, Architects,
"1024-5-6 Hammond Building,
"Detroit, Michigan.

"June 5, 1917.

"DR. S. STRAITH,
"1461 David Whitney Bldg.,
"Detroit, Michigan.

"Dear Sir: We enclose herewith our bill for services rendered in connection with your building for the Hancock avenue lot.

"In accordance with our agreement, we are entitled to a commission of three per cent. on the estimated cost of the work, but as you have decided not to proceed at this time, we are glad to make the minimum charge. If at a later date you decide to go ahead with the building, we shall be pleased to apply this amount on the charges for same.

"We trust that this arrangement will meet with your approval and beg to remain,

"Yours very truly,
"DH:O. Encl. BAXTER, O'DELL & HALPIN."

The defendant testified that the first conversation which he had looking to the making of such a contract

was with Mr. Baxter, who at least had been a member of the firm. The defendant testified that in such conversation he was encouraged to go ahead with the project and enter into the contract with the plaintiffs. The defendant testified that Mr. Baxter, with whom he had had a former acquaintance, represented that he was of the firm of Baxter, O'Dell & Halpin, the defendant testifying as follows:

"I recognized him as Mr. Baxter, and then the name—I connected the name with him, and asked him if he was of the firm of Baxter, O'Dell & Halpin. He said he was."

He further testified that he had conversation with Mr. Baxter and showed him some plans which had been prepared by a Mr. Hunter, but which were never adopted; and he claims that the situation was talked over and the lot was mentioned. He further testified:

"I told him that I had bought the lot on contract, that I owed \$10,000 on it, and that I had besides that, equities to the amount of about \$10,000 in land contracts that I could put into the building, and that was all that I did have. 'Well,' he says, 'that's easy.' Put before going into the room, while speaking of it in a general way, he says, 'You ought to be able to build on that, that is easy, if you have got that lot.' Then I told him that I had these resources. 'Why,' he says, 'that is easy.' 'Well,' I says, 'if it is easy, I wish you would get somebody at it, for I have been unsuccessful.' 'Well,' he said, 'I am not in the active work in the office, but I'll put this up to the boys, and I'll have one of them come and see you.' * * *

"There was no other conversation that I recollect on that day between myself and Mr. Baxter in relation to this proposed transaction. Later on, I saw Mr. Halpin about the matter. I should judge about three weeks after that, three or four weeks after that, I called to see Mr. Halpin at his office."

There was no claim on the part of the defendant that Mr. Baxter ever had anything further to do in the matter. The defendant in this testimony was in

part corroborated by a young woman, who was assisting him in his office, by the name of Edna Hirt, who subsequently married and bore the name at the time of the trial of Edna Hirt Sannar.

There was direct testimony on the part of the plaintiffs that Baxter had not been a member of the firm for three or four years.

In the cross-examination of Mrs. Straith, the wife of the defendant, who had testified to certain interviews between the defendant and Mr. Halpin, one of the plaintiffs, at Mr. Halpin's office, the following occurred:

"Mr. Burns: Q. And you have given the matter, of course, a great deal of thought during the past week while the case has been on for trial, trying to recall such details as you could, in order to help win the case for your husband?"

"Mr. Voorhies: Now, just a minute; I object to the form of the question."

"The Court: The form of the question is objectionable."

"Mr. Burns: I will withdraw the question."

"Mr. Voorhies: Just a minute; I ask an exception to the remark of counsel."

"The Court: Note an exception."

"Mr. Burns: Well, what else would she be testifying for, if it wasn't for that purpose? Certainly not to help us."

"Mr. Voorhies: Well, go ahead."

At the close of all the testimony plaintiffs' counsel made a motion in the following language, and the following colloquy occurred:

"Mr. Hicks: There is just one motion that I want to make at this time, and that is that all the testimony of conversations between Mr. Baxter and the defendant which has any tendency to show that a contract was made between them at that time, be stricken from the record, on the ground that it's undisputed in this case that at that time Mr. Baxter was not connected with the firm of Baxter, O'Dell & Halpin."

"The Court: Well, I am inclined to think there is a lack of proof here to show that he had authority, that he was a member of the firm, and that he had authority to act for them; while he undoubtedly did voluntarily—or did offer to have Mr. Halpin come and see Dr. Straith, after all, I don't think that that would be sufficient to bind the firm as to any arrangement that might have been talked between Dr. Straith and Mr. Baxter; because there is positive proof here that he was not actively connected with the firm, as I remember it, he was engaged in looking after some real estate holdings that he had.

"There is positive testimony that he was not a member of the firm, this suit is brought by O'Dell & Halpin, and I think Mr. Halpin said in answer to Mr. Voorhies' question that it was something like three or four years since Mr. Baxter was connected with the firm.

"Well, I think I'll strike out that testimony, that is, the testimony with reference to any arrangement between Mr. Baxter and Dr. Straith as to the preparation of these plans and the financing of the building. I'll let the testimony stand in so far as it shows how these parties were brought together; but as to the arrangement that was talked of between Dr. Straith and Mr. Baxter, I think I will eliminate that from the record.

"Defendant's Attorney: That is, if I understand your honor's ruling, the testimony is stricken out as to his contract relationships.

"The Court: As to any attempt to make a contract between Mr. Baxter and Dr. Straith.

"Defendant's Attorney: And it is only admitted for introductory preliminary purposes?

"The Court: Preliminary, to show—

"Defendant's Attorney: And the contract is the one that was made between Dr. Straith and Mr. Halpin?

"The Court: Yes.

"Defendant's Attorney: An exception, please."

The following requests on the part of the defendant to instruct the jury were refused by the court:

"(6) I charge you, gentlemen of the jury, that in order to warrant you in finding for the plaintiff in this

matter, you must unanimously find that they have established by a fair preponderance of the evidence all of the material elements of their claim.

"(7) If the plaintiffs in this case have in any feature failed to establish any one of the material elements of their theory of the case, then you should find for the defendant and your verdict should be no cause of action."

The charge of the court very fully, and, we think, fairly presented the issues in the case. After discussing the rule as to the burden of proof, the court said:

"Therefore, it follows that the plaintiffs, to entitle them to a verdict, must establish all of the material elements of their claim by such evidence as outweighs, in the minds of each of you, that given against it.
* * *

"Now, the first question that presents itself then for your determination is, What was the contract between these parties? Was it as the plaintiffs claim, a contract by which the plaintiffs were employed to perform services as his architects, which called for the drafting of plans and specifications and receiving bids and estimates, or was it, as the defendant claims, a contract which also obligated the plaintiffs to arrange for the financing of the project? If you find that the contract was as claimed by the plaintiffs, then the plaintiffs are entitled to your verdict. If, on the other hand, you find that the plaintiffs did undertake to arrange for the financing of the project, as claimed by the defendant, then your verdict would be for the defendant. * * *

"In determining what the agreement actually was, which these parties made between themselves, you must reach your conclusions from the evidence submitted to you in this case."

After the verdict and judgment were entered, the defendant made a motion for a new trial for the following reasons:

Because the court erred in refusing to give each of the requests above set forth; because the verdict of

"The verdict is not against the weight of the evidence. To hold otherwise would be to establish a rule that because the defendant produced two witnesses to the contract, as against one for the plaintiffs, that the jury are bound by defendant's testimony. The case presented a square issue of fact, which was resolved in favor of the plaintiffs and for which there is ample basis in the evidence.

"The motion for a new trial is denied without costs."

Exception was duly filed to the refusal to grant the motion for a new trial and the reasons therefor. The assignments of error cover the same subjects as those embraced in the motion for a new trial, together with the further assignment: That the court erred in denying defendant's motion for a new trial, and in all its reasons for such denial.

We will consider the questions presented in the order of the discussion of them by appellant's counsel.

1. Refusal of the court to give the 6th and 7th requests to charge. An examination of this record satisfies us that there is no merit in this assignment of error. We have never held that requests to charge must be given in their exact language. In that part of the charge which we have quoted, we think it distinctly appears that the substance of these requests was given, and therefore it may be said that they were embraced in the general charge of the court.

2. Was it prejudicial error for the court to strike out the testimony of the defendant as to the interview with Mr. Baxter, as indicated by the ruling of the court. We are constrained to answer this question in the negative, for the reasons stated by the learned circuit judge in disposing of the motion for a new trial. Further, Mr. Baxter was not a party to this suit. It may be said that the undisputed direct testimony shows that he had not been a member of the plaintiffs' firm for three or four years before the trial, which time antedated the making of the contract, whenever it was.

No claim is made that any bargain or agreement was entered into with Mr. Baxter. At the most, all that is claimed is that he said he would send the plaintiffs to see the defendant. The defendant's own testimony is that the only bargain or agreement that was ever made in the case was made with the plaintiff Halpin. We see no prejudicial error in the ruling.

3. Was there anything occurring in the cross-examination of Mrs. Straith which should reverse this case. We think not. Counsel for appellant call our attention to the ruling of this court in *Lumbert v. Prince*, 203 Mich. 242. The cases are readily distinguished. There counsel said to the witness: "What a liar you are." The court said: "Of course, gentlemen, you are supposed to give no attention to a remark of that kind; sometimes remarks come when we cannot avoid it." Which defendant's counsel supplemented with the exclamation: "For a man to sit there and tell me that!"

Here, when objection was made, counsel for appellees very promptly, upon the suggestion that the question was improper, withdrew it. To the last remark of appellees' counsel, counsel for appellant made no objection, but said: "Well, go ahead." The dissimilarity between the instant case and the case cited by counsel for appellant is so great that we refrain from discussing the question further, but call attention to the language of this court and the collection of authorities in the recent case of *Fishleigh v. Railway*, 205 Mich. 145.

4. The fourth point urged, and upon which error is assigned, is that the verdict was a compromise verdict. Unless we are to say that in every instance in which a jury renders a verdict for a less sum than is claimed by the plaintiff the verdict is a compromise, there is no reason for us to hold in this case that this verdict was a compromise verdict. It is true that the plain-

tiffs sued to recover the sum of \$6,000, and offered testimony tending to show that their services were worth that sum. It appeared, however, during the trial of the case, that the plaintiffs had rendered a bill to the defendant of \$3,000, and we cannot say that the jury acted unreasonably or improperly in cutting the plaintiffs' claim down to \$2,500. We think it is a matter of which the defendant cannot complain—that the judgment was too small. There is nothing here to indicate that the jury did any “splitting of differences.” See *Crawl v. Dancer*, 180 Mich. 607.

5. The claim that the verdict was against the great weight of the evidence was submitted to the trial judge in the motion for a new trial. We have quoted his language in denying it. It is only in a clear case that this court will overrule the judgment of the trial court upon the question of the weight of the evidence. We have so recently, and so often, spoken upon this subject that we do not care to cite authorities. See, however, *Druck v. Antrim Lime Co.*, 177 Mich. 364, 374; *Pachuczynski v. Railway*, 202 Mich. 594. We do not think there is any merit in the question. The evidence was all before the jury; they had all the facts. There was a sharp issue between the plaintiffs on the one hand and the defendant on the other. The jury passed upon this issue under a full and fair charge of the court, and we cannot say, upon examination of this record with care, that the verdict was against the great weight of the evidence.

There was no error in the denial of the motion for a new trial; and, in our opinion, there is no prejudicial error in the record, and the judgment of the court below is affirmed.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

SCHURTZ v. CITY OF GRAND RAPIDS.

1. EVIDENCE—MUNICIPAL CORPORATIONS—RECORDS OF CITY COUNCIL
BEST EVIDENCE.

In a suit by a taxpayer to restrain a city from acquiring a public utility without an affirmative three-fifths vote of the electors voting thereon, testimony of "talk" in the common council was incompetent and cannot be considered in view of the record proceedings.

2. APPEAL AND ERROR—AFFIDAVIT VARYING RECORD NOT CONSIDERED
ON APPEAL.

An affidavit of a witness appended to defendant's brief, that testimony on a certain page of the record "should have read as follows," cannot be considered on appeal.

3. MUNICIPAL CORPORATIONS—PUBLIC UTILITY—WATERWORKS—
COMPLIANCE WITH CHARTER.

If in the settlement of a claim by a waterworks company against a city, the city attempted to acquire or purchase a public utility within the meaning of the charter language, then the terms of the charter must be complied with.

4. WORDS AND PHRASES—"UTILITY"—"PUBLIC UTILITY"—DEFINITION.

"Utility" means the state or quality of being useful; a "public utility" is one useful to the public.

5. MUNICIPAL CORPORATIONS—WATERWORKS—ACQUIRING PUBLIC
UTILITY—CONSTITUTIONAL LAW—GRAND RAPIDS CHARTER.

An attempt by the city of Grand Rapids in the settlement of a claim against it for water furnished, to take over the property of a privately owned waterworks plant, without the same having received the affirmative vote of three-fifths of the electors voting thereon, *held*, to be a transaction involving the acquiring of a public utility within the meaning of section 25, Art. 8, Constitution of Michigan, and section 28, Art. 8, of the city charter adopted in pursuance of the "Home Rule Act" (Act No. 279, Pub. Acts 1909), and therefor void.

6. CONSTITUTIONAL LAW—CONSTRUCTION.

The language of the Constitution should receive a strict, but reasonable, construction.

7. STATUTES—CONSTRUCTION—IMPLICATIONS.

"That which is expressed makes that which is implied to cease."

8. MUNICIPAL CORPORATIONS—TAXPAYER'S INTEREST TO RESTRAIN ILLEGAL ACQUISITION OF PUBLIC UTILITY.

A resident taxpayer and qualified elector of defendant city has an interest in the several funds of the city and in their integrity, and may maintain suit to restrain the city from acquiring a public utility not receiving the sanction of three-fifths of the electors voting thereon, as required by the Constitution and the city charter.¹

Appeal from superior court of Grand Rapids; Perkins (Willis B.), J., presiding. Submitted October 10, 1919. (Docket No. 30.) Decided December 23, 1919.

Bill by Perry Schurtz against the city of Grand Rapids to enjoin the acquisition of a public utility. From a decree dismissing the bill, plaintiff appeals. Reversed, and decree entered for plaintiff.

Shelby B. Schurtz, for plaintiff.

Ganson Taggart, City Attorney (*Walter S. Palmer*, of counsel), for defendant.

STONE, J. The bill of complaint herein was filed to restrain the defendant city from acquiring the Grand Rapids Hydraulic Company, an alleged public utility, and its property and franchises without an affirmative three-fifths vote of the electors, and from paying \$30,000 or any amount of money therefor, and to have the attempted purchase and acquisition declared void and of no force and effect. The bill is based upon constitutional, statutory, and charter provisions requiring a three-fifths vote of the electors to authorize the city to acquire any public utility.

A brief history of the organization and operation

¹On right of resident taxpayer, in absence of statute to enjoin unlawful expenditures by municipality for waterworks, see note in 36 L. R. A. (N. S.) 20.

of the Grand Rapids Hydraulic Company may be helpful to an understanding of the questions involved. It was incorporated in 1849 under "an act to incorporate the Grand Rapids Hydraulic Company," approved April 2, 1849 (Act No. 223, Laws 1849), with a capital of \$30,000, with power to furnish and supply water to the inhabitants of Grand Rapids, and it is alleged and we think it appears that said company, or its receivers, successors or assigns have continued to operate such utility down to the time of the hearing of this cause.

In 1889 the legislature by Local Act No. 404 authorized the township of Grand Rapids to establish and maintain a fire district within the limits of section 29 of said township, and to provide fire protection within the same. The board was given the power to rent from any water company laying its mains through any street within said fire district such a number of hydrants as might in the opinion of the board be necessary to afford fire protection for said fire district, and to increase the number of such hydrants from time to time as might by the board be deemed necessary. The expense of renting said hydrants was provided for by a tax upon all the taxable property within said fire district, to be spread upon the annual tax roll of said township. Acting under the authority so given, the township board of said township did provide a fire district constituting the west one-half of section 29, and made a contract with the Grand Rapids Hydraulic Company on June 13, 1889, to install and maintain fire hydrants, said contract to continue for a period of 30 years. The Hydraulic Company, acting under such contract, installed some 24 fire hydrants at an annual rental of \$30 per hydrant. The rent thus accruing was paid up to and including 1891. In 1892 this portion of the township was annexed to the city of Grand Rapids, and the rent was not thereafter

paid, although it is claimed by defendant that claim was made from time to time for the same, and that about 17 of the hydrants were, for a number of years after such annexation, the only fire protection in that district.

The act under which the Hydraulic Company was organized contained no limitation upon the life of the corporation save this: It was provided that "the legislature may at any time hereafter amend or repeal this act." In 1905 the legislature exercised this authority, and by Acts Nos. 455 and 492 of the Local Acts of that year, repealed said Act No. 223 of the Laws of 1849. At the same time it gave to said company the right to present a claim for the value of its tangible property to the common council of the city of Grand Rapids. The constitutionality of said repealing acts was sustained by this court in the case of *People v. Calder*, 153 Mich. 724, and on error to the Supreme Court of the United States the decision of this court was affirmed (*Calder v. Michigan*, 218 U. S. 591 [31 Sup. Ct. Rep. 122]). In the opinion in this court it was said:

"The repealing act does not take from the corporation any personal or real property acquired during its legal existence. It does take from it this, and only this: Its right to continue to be a corporation. It takes from it no right, franchise or power which does not depend for its existence upon the granting clause of the charter, and these it had a legal right to take."

The right to present a claim to the common council of the city was given in the following provision of said act of 1905:

"The Grand Rapids Hydraulic Company may at any time before January 1, 1906, and not thereafter, present a claim to the common council of the city of Grand Rapids for the value of the real and tangible estate owned by it, not including franchise, at the time of

the approval of this act, and transfer such property to said city in consideration therefor. If the said company and the said common council shall be unable to agree upon the valuation of said property within thirty days thereafter, then such claim may be filed within the further time of thirty days, in the form of a claim in assumpsit in the superior court of Grand Rapids, and issue framed thereon in the nature of assumpsit. The rules and practice in suits in assumpsit shall be applicable thereto. Either party to such issue may take the same for review to the Supreme Court of the State, upon the questions of law raised upon the trial, or charge of the court made to a jury, if the same shall be tried before a jury. The amount finally awarded to said company against the city of Grand Rapids shall be a claim against the city, to be paid in the same manner as other claims: *Provided*, That if the said Hydraulic Company shall not elect to present a claim against the said city and transfer its property to said city, it may, upon giving a bond with sufficient sureties to be approved by the common council, to protect the city from any damages caused thereby, remove all of its tangible property from the streets, lands, and alleys in said city, under the direction of the board of public works of said city, and in the event of any disturbance of the street or alley grades, or injury thereto, caused by said removal, it shall at the time of removal of its property therefrom cause the said streets, lands and alleys to be repaired and placed in as good condition as before."

Said Act No. 455 is in language identical with the above, from said Act No. 492, and the record states that this act is expressly reserved from repeal in the charter of 1916, hereinafter referred to.

There appears to have been filed with the city clerk, on December 30, 1905, a communication, or so-called claim, by the president and directors of the Grand Rapids Hydraulic Company. After referring to the act repealing the charter, it stated that in the year 1893, in an action in the United States court at Grand Rapids, wherein the American Loan & Trust Company was complainant, and said company was defendant, a

receiver was appointed for all the property of said company, and that said receiver had ever since been in possession of the same; that the amount of the bonds duly issued by said company was \$680,000; the amount of the accrued interest thereon remaining unpaid was \$244,800, making a total of \$924,800; that because of the rights of the receiver and of the bondholders represented by him amounting to the said sum of money plus the expense of the receiver, estimated at \$25,000, the company was unable at that time to present an exact claim for the real value of its real and tangible estate, nor its constitutional right to do business as a going concern, which the city proposed to take over to itself, and now owned by it, subject to such claims, for less than the sums above mentioned. It accordingly claimed (if said act be valid and constitutional, which it did not concede) the said sum, and it offered thereby to sell its property to the city for the sum of \$949,800.

Attention was called to the contract with the township of Grand Rapids, for the furnishing of 24 fire hydrants at \$30 a year for a period of 30 years from 1889,—no part of which rental had ever been paid, except the rental for the years ending March 1, 1890, and March 1, 1891, which payments were made by said township of Grand Rapids; that in the year 1892 the said western half of section 29 of said township became a part of the city of Grand Rapids; that since the year 1891 no part of said rental had ever been paid; and that on said contract there had accrued the sum of \$14,542.37 principal and interest, which was then due and owing by the city to the said receiver and to the company.

This communication was referred by the council to the committee on ways and means, and the city attorney. The committee and the city attorney made a lengthy report. It referred to the repeal of the char-

ter of the company, and the privilege to present a claim to the council for the value of the real and tangible estate owned by it. Attention was called to the claim that the repealing act was unconstitutional, and the report stated that the claim was inconsistent:

"Your committee is of the opinion that this claim should not be seriously considered by the common council for the foregoing, as well as the following reasons:

"(1) It is not a claim under the act, because not made for the 'tangible' property of the company, but for bonds that never, from the best information your committee is able to obtain, had a value of more than 20 per cent. of their face, and many of which were sold for a less price than that.

"(2) Because the offer of said company is not a *bona fide* one as shown by the express determination of the company not to abide by any settlement or adjudication of the claim, unless the entire amount demanded by the company is paid.

"(3) Because the company in the offer filed, shows facts that negative any authority or power on its part to carry out any agreement or adjudication that might be had on the claim. It appears therein that all of its property is in the hands of a receiver in the United States court, where it has resided for a period of nearly 13 years. No order of such court is shown to have been made directing or authorizing the receiver to act or abide by any agreement made with the common council of the city, or adjudication had on such claim.

"(4) Your committee has been advised by the receiver of said company, and so it appears from its communication to the common council, that no interest has been paid upon said bonds since their issue, for a period of 13 years and upwards, and from such communication it also appears that the expense of administering the trust, amounting to \$25,000.00 due the receiver, has not been paid. Your committee is not informed whether the company's running expenses have been paid, but know that it has been with the utmost difficulty that city taxes have been collected from said company for several years. * * *

"As to the claim made by the Hydraulic Company for hydrants furnished to the township board of Grand Rapids township in the year 1889, and the contract said to have been made by the Hydraulic Company with said township board, your committee is not otherwise advised than appears in such communication. If any claim exists or is made by the Hydraulic Company for hydrants used within that portion of the township afterwards brought within the city of Grand Rapids, the claim should be made specific and presented by itself. So far as your committee is advised, no part of the same is a legal claim against the city, but it does not assume to pass upon the merits of it, in this report."

This report was adopted, and no further action seems to have been taken by the common council thereon. No action was ever taken in the superior court, as provided for in the act. There was considerable testimony of "talk" in the common council, but such testimony was incompetent, and cannot be considered, in view of the record proceedings. Neither can we consider the affidavit appended to the defendant's brief. It is alleged in the 12th paragraph of the amended bill of complaint, as follows:

"That in 1915 the Grand Rapids Hydraulic Company offered to sell to the city all its assets, in the city and outside, free and clear from all liabilities, for \$80,000. That on Monday, April 3, 1916, this proposition was submitted to a vote of the electors of the city, and voted down by a vote of 'Yes, 6,506 votes, No, 10,737 votes,' and which proposition was duly declared defeated by the board of canvassers."

This allegation is by the answer admitted to be true, and the record sustains the allegation.

In the meantime the property of the Hydraulic Company had been sold under mortgage foreclosure in the Federal court to John J. Collins for \$34,000, and the sale had been confirmed, and he seems to have acquired all the rights of the company to any claim it had against the city. On August 29, 1916, the voters

of Grand Rapids adopted the present city charter, under the home rule law, which charter will be later referred to. On January 16, 1919, one Fitzpatrick appeared before the city commission and announced that the Hydraulic Company was ready to make a proposition to sell the property of said company, inside the city limits, to the city, whereupon the matter was referred to the committee on public service and city manager, and that the company's proposition be submitted in writing. On March 29, 1919, at a meeting of the city commission, the mayor stated that the meeting was called for the purpose of hearing a report of the city attorney in regard to the purchase of the Hydraulic Company's property and rights, at the price of \$30,000. The communication from the city attorney, among other things, stated:

"Under the charter, sections 27 and 28 of title 8, and under the home rule act, section 3307 of the Compiled Laws of 1915, as amended, a city has no right to acquire an existing public utility, except the question be passed on affirmatively by three-fifths of the qualified electors of the city, voting thereon at a regular or special municipal election.

"Whether the taking over of the property of the Hydraulic Company, which would involve the taking over a part of it for park purposes, a part of it for use in connection with the water department, and a settlement of their claim under their old contract, would be a taking over of a utility, within the intent and meaning of the charter and home rule statute, is, in my opinion, a debatable question. It is not the taking over of the utility as a going concern, although the effect would be to wipe out the hydraulic company as a competitor of the city."

Thereupon, and notwithstanding the adverse vote of April 3, 1916, of the electors, and without any attempt to submit the matter to the vote of the electors, the following resolution was adopted by the city commission:

"Resolved, that the claim of John J. Collins, or his assigns, against the city on contract for furnishing water to that part of the township of Grand Rapids now annexed to the city, acquired by said Collins under foreclosure sale in the United States district court for the western district of Michigan, be settled for the sum of thirty thousand (\$30,000) dollars, conditioned that said Collins deliver to the city a deed and transfer of all the real and personal property, either within or without the city of Grand Rapids, except the Bailey Springs property, coal at pumping station and accounts receivable acquired by him on said foreclosure sale, or acquired since in connection with the use and operation of said property, free from all liens and claims of any nature, the same to be payable, five thousand dollars on delivery of deed and discharge of said claim, and the balance on or before sixty days, *conditioned* that marketable title to said property and all thereof be shown and *conditioned* that Mr. M. C. Gray shall give the city a written guarantee of title, and agreement that the money paid shall be returned to the city, in case any question of the city's right or title thereto shall arise. And the city comptroller issue and deliver an order for five thousand (\$5,000) dollars accordingly from the waterworks extension fund to Anne L. Sullivan, and the clerk and comptroller be instructed to draw an order on the city depository for the said sum of five thousand dollars (\$5,000) in favor of the city treasurer."

On the same day the city comptroller issued warrant No. 7,953 for \$5,000 payable to Anne L. Sullivan, out of the waterworks fund of the city, as first payment on the purchase of the Grand Rapids Hydraulic Company plant, and said warrant was delivered to M. C. Gray, who signed the name of Anne L. Sullivan in receipt thereof. On said March 29, 1919, there was delivered to the defendant the following guarantee by Mr. Gray:

"GRAND RAPIDS, MICH., March 29, 1919.

"For, and in consideration of the sum of one dollar, the receipt of which is hereby acknowledged, and the payment by the city of Grand Rapids, Michigan, of

the sum of five thousand dollars to Anne L. Sullivan for the purchase of the property formerly owned by John J. Collins, doing business as the Hydraulic Water Company, I hereby guarantee the title of said Anne L. Sullivan to the said property, both real and personal, and that the same is free and clear from all liens and encumbrances whatsoever, and hereby agree to make the city whole, both principal, interest and costs, if any claim shall be asserted thereto, or any part thereof, and agree that any money paid to her, or to her assigns, by reason of said transaction, shall be returned to the said city, if any claim shall be made regarding the legal authority of said city to acquire said property, upon notice thereof, and offer of reconveyance of the property in question.

"M. C. GRAY. [L. S.]"

On said March 29, 1919, a warranty deed was duly executed, acknowledged and delivered by said Anne L. Sullivan to the city of Grand Rapids. After describing certain lots in the city the deed contains the following language:

"Together with all machinery, pipes, outfits, liberties, privileges, franchises and property, real or personal, excepting Bailey Springs property so-called, acquired by John J. Collins on mortgage sale, under mortgage given by the Grand Rapids Hydraulic Company, or acquired since the date of said sale by said Collins, operating as the Hydraulic Water Company, also any and all claim arising under and by virtue of a certain contract for supplying of water to lands adjacent to, and east of the city of Grand Rapids, but have since been annexed to said city, including contract regarding the same, the purpose and intent of this deed being to convey all property owned by, or used in connection with the carrying on of the business by said Collins as the Hydraulic Water Company, excepting only the Bailey Springs property so-called, and the coal now upon the said property heretofore described."

On April 1, 1919, said deed was recorded in the office of the register of deeds of Kent county, and on

the same day the original bill of complaint herein was filed.

Not only is it true that the Hydraulic Company, its receivers, successors or assigns, continued to operate this plant as a going concern—sometimes known as the Hydraulic Water Company and sometimes as the Hydraulic Company—and continued to be a competitor of the city, down to the time of the alleged sale to the city, but it appears that since said alleged purchase the property has been operated by the city as an independent plant. An officer of the city testified as follows:

“We are using the pumping station of the Hydraulic Company to supply the Hydraulic mains. Every employee they had at the time this matter came up is still in their employ, so far as I know. The matter is held in abeyance so far as the city and the Hydraulic Company are concerned, until the determination of this suit. Just as clean-cut and separate as if it was entirely by itself.”

So it was not the mere attempted purchase of some pipe in the ground or “old junk,” as claimed by defendant, but it was the attempted purchase of a “going plant,” with its pumping station, coal and supplies, a property which had been used in active competition with the waterworks of the city.

The plaintiff relies upon the constitutional provisions, the home rule statute, and the charter provisions set forth in the bill of complaint, requiring an affirmative three-fifths vote of the electors of the city to acquire or purchase any public utility. He claims that there was here a privately owned public utility; that the transaction of March 29, 1919, was void, because the Constitution, statutes, and city charter have pointed out the method to obtain plants like the Hydraulic Company, and such method excludes all other methods; that the transaction alluded to was in reality an attempt to purchase a public utility, and that the alleged

settlement of a claim against the city was a mere pretense and subterfuge to avoid and evade the constitutional, statutory, and charter provisions relied upon.

At the expense of tediousness we think we should quote sections 27 and 28 of title 8 of the new charter. They are as follows:

"SEC. 27. The city of Grand Rapids shall have and it is hereby given the right and power to acquire, construct, own, operate and maintain either within or without its corporate limits, street railways, subways, and any and all transportation facilities, waterworks, electric light works, gas works, power works, heating works, telephone and telegraph lines, conduits, bridges, viaducts, wharfs and docks, market and market houses, garbage collection, garbage disposal and reduction plants, paving plants and appliances, and such other public utility enterprises or service as the city commission may from time to time determine and designate, and to acquire all property, real or personal, necessary or proper therefor, and to maintain and operate the same, or to lease the same or any part thereof, to other corporations or individuals for the purpose of maintenance and operation. Said city may also sell and deliver water, heat, power, light and other service of any such utility as it is now or may be hereafter authorized to do by the laws of the State.

"SEC. 28. The city shall have and it is hereby given the power and right to acquire, by purchase or condemnation, existing franchises, if any, and the property used in the operation of any and all companies or individuals now engaged in the street railway, tram railway, electric light, gas, heat, water, or power business in the city: *Provided*, that the proposition to acquire or to construct any public utility under section 27 of this title and the proposition to acquire by purchase any existing franchise and property under this section, shall have first received the affirmative vote of not less than three-fifths of the qualified electors of said city voting thereon at a regular or special municipal election, and upon such propositions women taxpayers having the qualifications of male electors shall be entitled to vote: *Provided further*, that in any such referendum the approximate purchase price

or cost of construction, as the case may be, shall be a part of the question submitted to the people, and that the city shall not pay or agree to pay therefor more than ten per cent. in excess of such approximate purchase price or cost of construction, as the case may be: *Provided further*, that the city shall in no case purchase or pay any consideration for any franchise or privilege hereafter granted, renewed, or extended, except as herein otherwise provided: *Provided further*, that the qualified electors of the city may initiate the proposition or ordinance to acquire, construct or operate any such public utility and have the same submitted to the vote of the qualified electors for their approval or disapproval in the same manner as provided in this charter for the initiation and approval of ordinances."

It is the further claim of the plaintiff that there was here an attempt by the defendant to utterly disregard not only the Constitution, statutes and city charter, but also the vote of the electors against buying the Hydraulic Company in April, 1916; and that the clause inserted in the new charter in section 28, to wit: "and the property used in the operation of any and all companies or individuals now engaged in the street railway, tram railway, electric light, gas, heat, *water*, or power *business* in the city," had special reference to the Hydraulic Company, which was the only individual property so employed in the city.

The claim of the defendant seems to be that the city was authorized in the year 1872 to establish a system of waterworks for the purpose of supplying the city with necessary water for municipal, fire and domestic purposes; that this authority was acted on, the system established, and from time to time extended so that at the present time the city has a pumping station with a capacity of some 35 million gallons per day, and a filtration plant with a capacity of from 24 to 30 million gallons per day, and approximately 180 miles of pipe; that prior to the transaction in question, the

city took over certain of the hydraulic mains so that they could supply the customers with water; that the successors of the Hydraulic Company at this time had some 14 to 17½ miles of mains, and a pumping capacity of about one million gallons daily. It had mains in various city streets where the city had no mains, and in other, and particularly the downtown paved streets, and some 450 customers where its pipes parallel those of the city; and it had also various other mains of more adequate size than the city mains, and paralleling them. It is further claimed that the money paid the successors to the Hydraulic Company was from the waterworks extension fund, in which fund at the time there was a balance of \$33,805.04, raised from sale of bonds, which bonds are paid through revenue derived from the sale of the water.

It is especially urged by counsel for defendant that the act repealing the charter of the Hydraulic Company authorized, and in fact directed, the city to take over the property of the company, and to make payment therefor. We do not deem it necessary to decide this question, nor the question whether the contract with the township was a valid one and properly filed. If in the settlement of this claim the city attempted to acquire or purchase a public utility within the meaning of the charter language, then the terms of the charter must be complied with. In our opinion the action of the city commission was an attempt to acquire a public utility—a privately owned public utility. We think that the term “public utility” means every corporation, company, individual, association of persons, their trustees, lessees, or receivers, that may own, control, or manage, except for private use, any equipment, plant or generating machinery in the operation of a public business or utility. Utility means the state or quality of being useful. Was this plant one useful to the public? If so, it was a public utility. We think it was such.

Nor is it necessary for the disposition of the case, to hold that the transaction of the city commission in its attempt to get possession of the Hydraulic Company property and plant, by the settlement of the claim against the city, was a mere subterfuge or camouflage transaction. A careful reading of the proceedings which we have set out above, satisfies us that the real transaction was the attempted purchase of this plant without submitting the matter to the vote of the electors, and was void. The guarantee of Mr. Gray and the promise to pay back the entire sum paid is very significant. At best this alleged settlement was tentative and conditional on the result of a subsequent act or event, and so was not conclusive. 12 Corpus Juris, p. 341.

It is next urged by defendant that the transaction here involved was not the acquiring of a utility within either the spirit or letter of the Constitution, home rule, or charter. In this we do not agree with counsel. It is urged that the transaction had was an extension to, and not the acquiring of, a utility. Upon this subject we have read with great care the authorities cited by counsel. They embrace the following cases: *City of Indianapolis v. Trust Co.*, 75 C. C. A. 442, 144 Fed. 640; *Village of Champlain v. McCrea*, 165 N. Y. 264 (59 N. E. 83); *Stroud v. Water Co.*, 56 N. J. Law, 422 (28 Atl. 578); *Connor v. City of Marshfield*, 128 Wis. 280 (107 N. W. 639); *Shorts v. City of Seattle*, 95 Wash. 531 (164 Pac. 239); *Shryock v. City of Zanesville*, 92 Ohio St. 375 (110 N. E. 937); *State, ex rel. Crow, v. City of St. Louis*, 169 Mo. 31 (68 S. W. 900); also many of our own decisions.

The length of this opinion will not permit us to analyze these cases here. We invite an examination of them. In our opinion not one of them justifies the claim made that they are controlling here. Not one of them treats the question we are here considering.

If, in the extension of the city's water plant, it becomes necessary to purchase or acquire a public utility, in our opinion the matter must be submitted to the electors of the city. The Constitution requires it, and its language should receive a strict, but reasonable, construction. The unequivocal language of section 28 of title 8 of the charter does not permit the construction claimed for it by defendant's counsel. It is a familiar maxim that, "That which is expressed makes that which is implied to cease."

Neither do we agree with the proposition that the plaintiff, as a taxpayer in the city, has no standing in a court of equity, under the facts here disclosed. Under the repealing statute, which defendant insists is in force, the claim against the city was to be paid as other claims are paid. We are of the opinion that a taxpayer has an interest in the several funds of the city, and in their integrity. We think the proposition urged too narrow a one to require discussion. The learned circuit judge dismissed the bill of complaint. His reason, briefly stated, was as follows:

"I am convinced the city commission had authority to settle the claim of the Hydraulic Company for the amount specified; that the transaction was in good faith; and that in connection with such settlement it had a lawful right to take a deed to the Hydraulic Company's property as shown."

Plaintiff has appealed. For the reasons already stated, we are unable to agree with this conclusion of the circuit judge.

The decree below will be reversed, and a decree will be entered here for the plaintiff in accordance with the prayer of his bill of complaint, with the costs of both courts.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

FLINTOFF *v.* MUSKEGON TRACTION & LIGHTING CO.**1. DEATH—DEATH ACT—INFANTS — CONTRIBUTORY NEGLIGENCE OF PARENTS.**

In an action by a parent, as administrator, brought under the "death act," the contributory negligence of the parents would operate to defeat the action, based upon ordinary negligence.

2. STREET RAILWAYS — DEATH — INFANTS — CONTRIBUTORY NEGLIGENCE.

A bright, intelligent boy, of the age of 7 years and 5 months, who slid down a steep hill onto a street car track, knowing that cars were running thereon at frequent intervals, riding feet foremost and lying upon his stomach upon a sled, who was run over by a car and instantly killed, held, guilty of contributory negligence, as a matter of law.

3. SAME—TEST.

Age is not the true test as to whether a child is guilty of contributory negligence; it is the intelligence, and not the age, that must control.¹

4. EVIDENCE—ORIGINAL RECORD CONTROLLING.

Where plaintiff offered in evidence the original record of a resolution of the common council, he could not later contradict it by offering a corrected published copy, since the original record must control.

5. APPEAL AND ERROR—HARMLESS ERROR.

Where deceased was guilty of contributory negligence, which would bar recovery unless defendant was guilty of gross negligence, the trial court was not in error in excluding evidence of ordinary negligence.

6. STREET RAILWAYS — GROSS NEGLIGENCE — EVIDENCE — QUESTION FOR JURY.

Where the evidence as to the manner in which the injury occurred was in conflict, the trial court very properly submitted the questions of gross negligence, and of discovered negligence to the jury.

Error to Muskegon; Sullivan (James E.), J. Sub-

¹Authorities passing upon the question of age at which doctrine of contributory negligence may be applied to child, are collated in a note in L. R. A. 1917F, at page 42.

mitted October 17, 1919. (Docket No. 71.) Decided December 23, 1919.

Case by George A. Flintoff, administrator of the estate of George N. Flintoff, deceased, against the Muskegon Traction & Lighting Company for the alleged negligent killing of plaintiff's decedent. Judgment for defendant. Plaintiff brings error. Affirmed.

Alex. Sutherland, for appellant.

Charles B. Cross and *Wallace Foote*, for appellee.

STONE, J. This action was brought under the "death act," so-called, to recover damages from the defendant for causing the instant death of George N. Flintoff, the son of the plaintiff, a boy 7 years and 5 months old, at about noon on December 31, 1916, at the city of Muskegon. The first count of the declaration alleged the negligence of the defendant to consist of failure to ring a bell or sound a gong, to warn, when approaching the plaintiff's decedent where he was on the track; that defendant was guilty of gross negligence in not stopping the car to avoid the accident; and that defendant was negligent because it did not equip its car with proper fenders. The second count charged defendant with negligence in not complying with an ordinance of the city of Muskegon requiring it to equip its double-truck cars with air brakes and fenders. The plea was the general issue.

The place where the accident occurred was at the intersection of Cherry street with Wilcox street, upon the latter of which was defendant's track, and the car was going from Muskegon lake to Lake Michigan park. The streets cross each other at right angles. The deceased was coasting, or sliding down the hill on Cherry street at the intersection aforesaid. The hill was steep and somewhat obscured from the view of

the motorman by two houses located near the intersection, on the side where the hill was located. The Flintoff family home was located on Wilcox street about one block away from the scene of the accident. There was a curve in defendant's track as it came on-to Wilcox street going towards the park, about 150 feet, or half a block, from the place of the accident at said intersection.

There was some conflict in the evidence as to just how the accident occurred. On the part of the plaintiff the evidence tended to show that the deceased had been given a hand sled by his parents, as a Christmas present, the week before; that for some time previous to December 31 a number of children in the vicinity, including the deceased, had been accustomed to sliding down this hill; that on this occasion the deceased was lying on his stomach on his sled with his feet at the front of the sled, and in this condition he slid down the hill and onto the track of the defendant in Wilcox street, and was run over and instantly killed by the approaching car. The evidence was undisputed that the children knew that cars were running on Wilcox street. The plaintiff's principal witness, as to the accident, testified as follows: "We boys knew that the car was running there that day." The father of deceased, and plaintiff here, testified that he knew the boys were using their sleds on the street.

"Q. Had you known of his sliding down this particular hill?

"A. No, sir, he was forbid to slide on the hills,"—not stating who had forbidden him.

The mother of deceased testified that she instructed him that he should not slide on Pigeon hill—claimed by the plaintiff to be the hill in question; and she further testified that she had watched him as carefully as she could, but she knew that he was with his

sled, out on the street; that he had been allowed to go with his sled on the street at other times, but that she did not know anything about children sliding down this hill.

The motorman of the defendant in charge of the car, which was a double-truck car, was the only adult witness to the accident. He testified that after 11 o'clock a. m. at that time of the year cars went to Lake Michigan park every 15 minutes; that he had run this car for three months before the accident, passing this place about once every hour. He testified that he had not seen children there before; that he did not know that children were using that hill for the purpose of sliding on it, and that his attention had never been called to it by any person; that this car was due at Lake Michigan park at 12 o'clock, and that the accident happened at 11:47 o'clock a. m., and that the car was on time when it reached Wilcox street. He testified as to the curve on the street car track just as you enter Wilcox street; that as he came around this curve he was running from 7 to 10 miles an hour, with no power on while going around the curve. As the car straightened up on Wilcox street he gradually applied the current, and at the time of the accident the car was running about 10 miles an hour. He testified that he did not see the child until it was about 8 feet from the car, and that it came darting down the hill and ran right under the front step of his car. He testified the first he saw, "some of the children hollered, and I seen the little fellow coming down the hill, he was coming rapidly, and as he was coming he went right under the front step of my car." He testified that, instantly, when he saw the child, he reversed the power, and the reason why he operated in that way was because he could stop the car quicker by reversing the power, and that he applied the reverse just as quickly as he saw the child;

that he could, and did, stop the car within 20 feet. The manner in which the accident occurred is given by the witness in great detail.

In the cross-examination of the motorman the following question was asked:

"Mr. Waltz, if your car had a fender on, something like that, do you think the boy would have gone under the car?"

This question was objected to and the objection sustained by the trial court.

Upon the trial of the case the plaintiff sought to show by the records a resolution of the council of the city of Muskegon requiring the defendant to place air brakes and fenders on all its double-truck cars within 60 days after the service of the notice. The resolution, as recorded in the journal of the council proceedings, provided that the city recorder be instructed to place air brakes and fenders on all of its cars. Objection was made to the record of the resolution, for the reason that it was meaningless and imposed no duty upon the defendant. The court excluded the record of the resolution for that reason. Plaintiff's counsel then sought to introduce in evidence a copy of the published resolution, which stated the duty of the defendant to place air brakes and fenders on its double-truck cars. The court refused to receive in evidence this copy of the resolution for the reason that the original resolution, as it appeared in the record, was a meaningless thing, and, having been introduced by the plaintiff, he could not contradict it by the published copy of the resolution. The manner in which this difference occurred appeared in the testimony of the city recorder, in which he said:

"I corrected the one sent to the printer and told the stenographer to correct the other, and she evidently forgot it."

The court held that the record itself must govern, and that the plaintiff himself having discredited the original resolution, the copy should not be received in evidence.

The trial court, at the close of the evidence, held that the parents of the deceased were guilty of contributory negligence in permitting the deceased to go upon the streets with his sled in the company of other children; and that, therefore, there could be no recovery on the ground of ordinary negligence of the defendant; but it was ruled that the case should be submitted to the jury upon the claim made by the plaintiff, that the defendant's motorman was guilty of gross negligence. The case was so submitted under a lengthy charge, which fully stated the rule as to gross negligence, and as to discovered negligence. The court added the request of plaintiff's counsel, based upon *Fike v. Railroad Co.*, 174 Mich. 167, as follows, at the close of the charge:

"'If you find that the motorman could have seen the boy on the track by the exercise of ordinary care, for a time long enough to have stopped the car and avoided the accident, and that he did not do so, that would be gross negligence and the defendant would be liable.' I thought I told you that. I tried to tell it to you before, but I give it to you that way. That is the law, gentlemen."

The jury found in favor of the defendant of no cause of action, and the judgment was entered accordingly.

The plaintiff has brought the case here upon writ of error, and in his brief counsel for plaintiff discusses the questions raised by the assignments of error as follows:

- (1) Were the parents guilty of contributory negligence?
- (2) Was the defendant guilty of negligence in not equipping its cars with fenders?

(3) Did the court err in refusing to receive the testimony offered by the plaintiff in relation to the resolution of the council of the city of Muskegon, ordering defendant to equip its cars with fenders and its double-truck cars with air brakes?

1. As has been noted, this action was brought under the "death act," as distinguished from the "survival act." Under the authority of *Feldman v. Railway*, 162 Mich. 486, which was an action by a parent, as administrator, brought under the death act, the contributory negligence of the parents would operate to defeat the action, based upon ordinary negligence. In *Love v. Railroad Co.*, 170 Mich. 1, the distinction is pointed out between actions under the death act and those brought under the survival act. Without deciding whether the court erred in holding that the parents, as matter of law, were guilty of contributory negligence, we are satisfied that it should be held, under our authorities, that the deceased was, himself, guilty of contributory negligence. Here was a bright, intelligent boy, as testified to by his parents, of the age of 7 years and 5 months, who slid down this steep hill onto this car track, riding feet foremost and lying upon his stomach upon the sled, knowing that the cars were running upon that track at frequent intervals. If this did not constitute, under our authorities, contributory negligence it would be difficult to state a case involving that doctrine. The authorities upon this subject are thoroughly discussed in *Mollica v. Railroad Co.*, 170 Mich. 96. In that case, at page 101, Justice STEERE, speaking for this court, said:

"Where the plaintiff is an infant of such tender years as to be without discretion, contributory negligence cannot be imputed to him; and such is the general presumption where the child is under the age of 7 years. It is also held by some authorities that such presumption obtains, *prima facie*, until the age of 14 years is reached; but, where capacity is shown, the

general rule of contributory negligence will apply. While in the case of a child between the ages of 7 and 14 years the allegation of age might raise some presumption which tends to remove the imputation of neglect, it is mainly a matter of pleading; and the fact, when proven on the trial, does not establish that freedom from negligence essential to recovery."

Attention is called to the numerous Michigan cases there discussed, including the case of *Trudell v. Railway Co.*, 126 Mich. 73 (53 L. R. A. 271). There it was held that a child 7 years and 4 months old was guilty of contributory negligence. In the course of an unanimous opinion in that case, Justice LONG used the following language:

"Age is not the true test in such cases. It is the intelligence of the boy, not his age, that must control." Citing cases.

Attention is also called to the recent case of *White v. Cowing*, 205 Mich. 318, where some of our cases are cited. Had the trial court found, as we do, that the deceased himself was guilty of contributory negligence, the result would have been the same, to wit: that there could be no recovery unless the defendant was found guilty of gross negligence.

2. The second and third grounds may be discussed together. We do not think the court erred in excluding the record of the resolution of the common council and the purported printed copy thereof. Had the plaintiff rested content with the introduction of the published copy of the resolution, and had he not first discredited that, by the introduction of the original record, another question would be presented. We think the conclusion reached by the court upon this branch of the case was the proper one—that the original record, when offered by the plaintiff, must control. That record stood in its original form at the time it was offered in evidence.

Neither do we think the court erred in its ruling as to the question asked of the motorman upon the subject of fenders. If we are correct in holding, as we do, that this child was guilty of contributory negligence that would bar a recovery, except upon the theory that defendant was guilty of gross negligence, then the two subjects of the resolution and of the fenders was unimportant because they have to do with the question of ordinary negligence.

It is also urged by counsel for the appellee that the conduct of the defendant was not the proximate cause of the injury, but that the proximate cause was the darting down upon this track by the deceased, riding feet foremost upon his uncontrolled sled; and the following cases are cited upon that subject: *Lambeck v. Railroad Co.*, 106 Mich. 512; *Murphy v. Railway Co.*, 107 Mich. 627; *Cavanaugh v. Railway Co.*, 175 Mich. 161.

In the case last cited plaintiff was injured because his horse stopped on the track and refused to proceed, and it was held that the act of the horse caused the injury; and it is urged in the present case that the deceased was in a place of danger because he was unable to stop his sled in the manner in which he was riding, and in darting in front of the car. To the above cases may be added the cases of *Stoll v. Laubengayer*, 174 Mich. 701, and *Illinois Cent. R. Co. v. Dupree*, 34 L. R. A. (N. S.) 645 (138 Ky. 459, 128 S. W. 334). It is not necessary for us to pass upon this question, as the case is disposed of on other grounds.

Owing to the conflict in the evidence as to the manner in which the injury occurred, we think the trial court very properly submitted the questions of gross negligence, and of discovered negligence, to the jury. As we have shown, plaintiff presented a request upon that subject, and he went before the jury upon that

question. The jury found a verdict upon the merits of that question in favor of the defendant. We have examined the charge with great care, and if it is to be criticized at all it is because of its great length and the numerous reiterations of the correct rule. There can be no question as to the law of the case as presented by the trial court.

We find no reversible error in the record, and the judgment below is affirmed.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

SHERWOOD v. BABCOCK.

1. APPEAL AND ERROR—EXCEPTION AS MATTER OF COURSE—DENIAL OF JUDGMENT NON OBSTANTE VEREDICTO.

Under section 1, Act No. 217, Pub. Acts 1915, if the request for judgment *non obstante veredicto* is denied, an exception in favor of the party making the request follows as a matter of course.

2. JUDGMENT—PHYSICIANS AND SURGEONS—MALPRACTICE—EVIDENCE—SUFFICIENCY.

In an action against a physician for malpractice, evidence of plaintiff in support of his theory that a child in his family, treated by defendant for pneumonia, died of cerebro-spinal meningitis and that other children in the family were exposed and thereby became afflicted therewith, while defendant treated them for typhoid fever, *held*, insufficient, and that a motion for a directed verdict *non obstante veredicto* should have been granted.

3. SAME—JUDGMENT ENTERED IN SUPREME COURT.

Under section 2, Act No. 217, Pub. Acts 1915, where the Supreme Court finds that the trial court was in error in not entering judgment *non obstante veredicto*, as requested, judgment will be entered in this court.

4. APPEAL AND ERROR—ARGUMENT OF COUNSEL—TRIAL.

It was prejudicial error, in an action against a physician for malpractice, for plaintiff's counsel, in his argument to the jury, without any basis therefor, to state that defendant was represented by an attorney for the insurance company.

Error to Kalkaska; Lamb (Fred S.), J. Submitted November 4, 1919. (Docket No. 75.) Decided December 23, 1919.

Case by Wakeman L. Sherwood against Edgar B. Babcock for malpractice. Judgment for plaintiff. Defendant brings error. Reversed, and judgment entered for defendant.

Douglas, Eaman, Barbour & Rogers, for appellant.
Patchin & Duncan, for appellee.

STONE, J. This case has been brought here by defendant upon writ of error, to review a judgment against him for \$1,000 in an alleged case of malpractice. Defendant lived at Kalkaska, Michigan, and had been practicing medicine 35 years at the time of the trial. He is a graduate of the Detroit College of Medicine and licensed to practice medicine in this State. In April, 1917, defendant was called to the home of the plaintiff to treat a grandchild of the plaintiff, named Edwin Sen, and the child died on or about May 16, 1917. The case was diagnosed by the defendant as pneumonia, and during the last stages of the illness meningitis developed, and this was the immediate cause of the death of the child. About the time of the death of the Sen child, a child of the plaintiff, named

Irene, became ill, and died on May 30, 1917, the cause of her death being reported as typhoid fever. Later in the month of May two other younger children of the plaintiff, Edith and Imogene, were taken ill, and these children's cases were diagnosed as typhoid fever, by the defendant, and they were treated accordingly. The last two named children recovered from said illness. Soon after the death of Irene the defendant was discharged, and Dr. G. E. Tripp was called to take charge of the patients. Dr. Tripp never saw the Sen child, and was called into the case after the death of Irene. He saw and treated Edith and Imogene. At the time of his first call he was accompanied by Dr. A. S. Burrill, and Dr. Neihardt was also called in consultation on May 27th, and saw the three sick children of the plaintiff, as this was before the death of Irene. It is undisputed that the defendant consulted with Dr. Neihardt twice and with Drs. Burrill and Tripp once during his attendance upon the family. Dr. Burrill was also present when Dr. R. M. Olin, secretary of the State board of health, visited the two younger children after the death of Irene. A trained nurse was called on May 28th, about two days before the death of Irene. She testified as to the symptoms of the children and kept the chart of the cases.

Three claims of negligence are alleged in the declaration:

- (1) For failure of the defendant to segregate the other children from Edwin Sen when he was taken ill.
- (2) For failure to report the illness of Edwin Sen to the health board.
- (3) In not treating the children for cerebro-spinal meningitis.

When Dr. Tripp was called the patients were convalescing, and he was called by the plaintiff as a witness. It is the claim of the defendant that there was no medical testimony introduced showing that the de-

fendant did not use the means ordinarily used in that community in diagnosing the diseases from which the children were suffering; and it is the claim also of the defendant that there was no testimony that any child had cerebro-spinal meningitis, and that on the contrary all the medical testimony was to the effect that all the children of the plaintiff were suffering from typhoid fever. The defendant testified that the child Edwin Sen did not have cerebro-spinal meningitis. His report of the death certified that he attended the deceased child, Edwin Sen, from April 28, 1917, until May 15, 1917, and saw him alive on the last-named date, the death having occurred May 16, 1917, at 10 a. m. The report contains the following: .

“Cause of death was as follows: Meningitis. The contributory, pneumonia.”

The record shows that the certificate of death in the case of Irene Sherwood gave the date of death as May 30, 1917, and the cause of death as typhoid fever. Dr. S. E. Neihardt, who was called in consultation during the time the patients were under treatment by the defendant, testified that he had treated hundreds of cases of typhoid fever, and that he saw no evidence of cerebro-spinal meningitis, but concluded that the children were suffering from typhoid fever. Dr. Burrill also testified that the children were suffering from typhoid fever. The plaintiff, during the illness of his children, complained to the secretary of the State board of health about the treatment given his children by the defendant, and Dr. Olin personally made an examination of two of the patients and the surroundings, and gave as his opinion that the children had typhoid fever.

The complaint of the defendant is that in spite of the fact that there was no medical testimony supporting the allegations in plaintiff's declaration, and that

all the medical testimony was in direct contradiction of these claims, the case was submitted to the jury and the verdict rendered and judgment entered for the plaintiff. The court seems to have submitted the case to the jury on the theory that they had a right to gather from the symptoms given by the plaintiff and his wife, which they observed during the illness of the children, coupled with the statement of Dr. Tripp that he treated the patients as though they were suffering from meningeal infection, whether or not Edwin Sen had cerebro-spinal meningitis, and whether or not the other children were suffering from the same disease. The court charged the jury that before the defendant could be liable they must be satisfied that the child Edwin Sen was suffering from cerebro-spinal meningitis and that if they decided that it was not cerebro-spinal meningitis a verdict must be rendered for the defendant.

It is urged that all the evidence showed that the child Edwin Sen did not have cerebro-spinal meningitis but pneumonia, which terminated in simple meningitis; and the distinction between meningitis and cerebro-spinal meningitis, a communicable disease, was pointed out. It is the claim of the defendant that there was absolutely no evidence of any failure on his part to use the ordinary means of diagnosing the cases as practiced in cases of a similar nature in Kalkaska and vicinity; and that there was no medical testimony that he made any error in diagnosing the cases.

So much stress was laid by the trial court upon the testimony of Dr. Tripp that it is well for us to examine that testimony somewhat minutely and at some length. He testified on direct examination that he had been in the practice of medicine 16 or 17 years at the time of the trial, and that he graduated from the Grand Rapids Medical College in 1901. He tes-

tified that the first time he saw the cases was with the defendant and Dr. Burrill, which was two or three days before he was called to treat the children, and before the defendant had been dismissed from the cases. He testified that on the first occasion defendant called him at the plaintiff's request, and that Irene was dead before he was called into the case, and that when he came into the cases the two children, Edith and Imogene, were the patients that were ill. Asked if he made a diagnosis of the cases he answered:

"I made a pretty thorough examination, and then Dr. Burrill and Dr. Babcock and myself retired to a room adjoining the sick room and had probably what you would call a diagnosis. After Dr. Babcock was dismissed from the cases and I had charge of them alone, I did not make a further diagnosis of the cases; I prescribed medicine for them and went on treating the children for the disease or sickness which they had.

"Q. Now, what symptoms did you discover in the case of the girl Edith, when you took charge of her case and started your treatment, doctor?

"A. Why, as far as the objective symptoms were concerned the girl was, of course, from her long illness—was pale and more or less emaciated and there was an absence of reflexes and, I think, the head was a little bit drawn to one side. And the subjective symptoms, the little girl had a temperature of—probably 102 or 102½, and a little tendency to coma. There was some conjunctivitis—redness of the eyes, and I guess that was about the only symptoms that I noticed.

"Q. Then had you learned in any way the history of the case, previous to the time that you had taken charge of the case?

"A. Only as the cases were talked over among the doctors.

"Q. Then all the information you had as to the history of the cases was from the statement of Dr. Babcock?

"A. Why, I presume that the family naturally would talk about their own cases.

"Q. And at the time that you had made your call—at the time that you say the diagnosis was made, all

the information you had as to the history of the cases was derived from the statement of Dr. Babcock?

"A. I believe it was, yes, sir.

"Q. And that was the only basis upon which you could make your diagnosis from the history—that is, the historical part of it?

"A. Well, we had, I believe, the case report, the clinical report of the nurse in attendance—Dr. Babcock's nurse; I wouldn't say that positively, but I think we had the report there. * * *

"Q. Now in that report, or in giving you a history of the case, was the case of Edwin Sen, who had been in the family before, reported to you in order to assist you in making the diagnosis?

"A. I don't think so.

"Q. So your diagnosis was made independently of the history of the case of Edwin Sen?

"A. I believe so.

"Q. And also of Irene Sherwood's?

"A. Oh, I presume these things would have a direct or indirect bearing. It would be a natural thing in an illness of that kind to touch upon all those cases.
* * *

"Q. Now, doctor, did you know at that time that the child Edwin Sen had died in that house and that his case had been reported as—the cause of death as meningitis, and that the patients that you were then examining had been associating and mingling with that patient during the time that he was ill with that sickness? * * *

"A. Yes, I believe I learned from some source that Edwin Sen was supposed to have pneumonia, and died from meningitis.

"Q. Well, was that fact taken into consideration in your first—at the time you were in consultation with Drs. Babcock and Burrill on this case?

"A. Yes, I believe it was.

"Q. Now, you hadn't at that time examined the symptoms of those children yourself—the remaining children?

"A. Yes, I had. * * *

"Q. Now, when you came into the cases to take charge of them yourself, did you learn anything further of the history of the cases from what you learned

at the time that you were there in consultation with Dr. Babcock?

"A. No, I don't believe I did, only as, probably Mr. or Mrs. Sherwood told me how the children died.

"Q. Did they tell you the symptoms that the other children had manifested?

"A. I presume so, as nearly as they could.

"Q. Now, had you heard, or had you known, outside of that, and before the time you came there the first time, as to whether these children were sick and what purported to be the ailment?

"A. Yes, sir.

"Q. And what was reported to be the ailment, doctor?

"A. I believe typhoid fever.

"Q. As to which children?

"A. Why, the children that were ill.

"Q. You had received that report from Dr. Babcock, hadn't you?

"A. I think that was generally reported in the neighborhood and throughout the country—throughout the town—that the Sherwood family had got typhoid fever. * * *

"Q. Now when you found and examined those children, doctor, on your own account, did you find symptoms there that would indicate the presence of cerebro-spinal meningitis?

"A. No, sir, I did not.

"Q. Well, what would you say, Dr. Tripp, that the symptoms of cerebro-spinal meningitis were?"

The question was objected to because the witness said there were no symptoms of that, but the question was repeated.

"Q. What are the symptoms of cerebro-spinal meningitis?

"A. Why, in the history of the case I presume the child as a rule was taken suddenly, and with exaggerated train of symptoms and probably with a vomiting that you find—well, it is said to be a reflex from spinal irritations, that is, you might say a brain vomit, and you would get the spasmodic condition of the muscles perhaps, and arching of the back which pro-

duces a pain in the back of the neck and with high temperature, muscular movements and jerking.

"Q. What about the brain, or whether there would be delirium, doctor?

"A. Yes, sir, you would be apt to get a delirium.

"Q. And what condition would you expect to find the eyes in, in such a case?

"A. Well, I don't think that would be—why, inequality of the pupils or perhaps dilation, or maybe a contraction, but I don't think the condition of the eyes would be a positive symptom, that would be variable.

"Q. But there might be a dilation of the pupil?

"A. Oh, there might be, yes, sir.

"Q. And if you found a case that manifested these particular symptoms that you have now enumerated, you would expect that cerebro-spinal meningitis was present?

"A. No, I don't really think I would, I would probably look for meningitis, something that would give you a cause of the meningeal trouble, whether it came primarily or secondarily from something else.

"Q. But you have enumerated some symptoms that are manifested in cases where the patient was afflicted with cerebro-spinal meningitis?

"A. Yes, sir.

"Q. Now, if you found the great number or the greater part of those symptoms manifested in a particular case, what would your conclusions be from that, as to whether or not they had spinal meningitis?

"A. I would think there was a possibility of their having spinal meningitis.

"Q. And if they manifested these symptoms that you have enumerated as being the prime symptoms and those direct or characteristic of that particular case, would you not say that that child or patient was afflicted with spinal meningitis from that?

"A. No, sir, I would not.

"Q. What other disease would manifest that same combination of symptoms?

"A. Well, there might be a meningitis from perhaps some other cause, I think I would go further in my diagnosis.

"Q. Well, what further would you do?

"A. I would probably have to have a laboratory diagnosis, before I imparted that intelligence to the family.

"Q. Then you think that all of those symptoms might be present and the laboratory diagnosis show some other ailment?

"A. No, it might verify my diagnosis.

"Q. But you could not attribute these symptoms to any other disease, could you, if you found those symptoms present there, the symptoms that would lead you to believe that the patient was afflicted with cerebro-spinal meningitis, wouldn't you?

"A. Well, now, I don't know whether you are making any distinction in the form of meningitis?

"Q. I am not.

"A. Well, then I would suspect spinal meningitis, yes, sir.

"Q. And unless you had some proof to the contrary, if those symptoms were manifested you would call the case spinal meningitis, would you not, cerebro-spinal meningitis?

"A. Well, I would probably have a further diagnosis in that particular case to verify my own ideas. * * *

"Q. Well, doctor, what would you do while you were getting the further diagnosis, what would you be treating the patient for?

"A. Well, I think, in any case, I would perhaps isolate this patient—in any case and wait.

"Q. If you found those symptoms there you think it would be sufficient cause to have the patient isolated?

"A. Yes, sir.

"Q. Then if you didn't find anything to the contrary from subsequent examination you would be satisfied in your own mind that the patient was afflicted with cerebro-spinal meningitis if it exhibited the symptoms you have enumerated?

"A. I would either do that or I would have to go on and treat it symptomatically, and meet those conditions as I found them, that is what anyone would do, I think. * * *

"Q. But you did segregate them?

"A. No, sir, I did not.

"Q. Then they had already been segregated at the time you took them?

"A. I think those cases were ill right there in the room, that is the way the house is arranged, those cases were there ill in the room just as they had been previous to that—Mr. Sherwood can tell you about that, but I know I did not take any special precautions as far as isolating those cases.

"Q. But you treated for symptoms you found—

"A. At the time.

"Q. And those were symptoms that would indicate that there was cerebro-spinal meningitis present, weren't they? * * *

"A. No, sir, there has been no diagnosis made of cerebro-spinal meningitis. * * *

"Q. Well, doctor, what did you treat the patients for, what particular disease?

"A. I treated those patients as though they were suffering from meningeal infection.

"Q. You mean by that an infection of the meninges of the brain and spinal cords?

"A. Yes, sir, of the brain and cords.

"Q. I ask you doctor, whether or not segregation is not one of the instructions from the health board, the health department, in all cases where meningitis is present?

"A. Well, I really believe that if that is cerebro-spinal meningitis in its nature that that is what we are instructed to do.

"Q. Is there any medical distinction made between any other meningitis and cerebro-spinal meningitis?

"A. Why, yes, I believe there is."

At the close of the plaintiff's testimony, counsel moved for a directed verdict of no cause of action for the following reasons:

"*First.* In order to submit a case of malpractice to a jury it must be shown by expert testimony—that is, some doctor or medical man, that what the defendant did, or omitted to do, was not in accordance with the ordinary and usual practice in the community where he practiced.

"*Second.* It must be shown affirmatively by the plaintiff that on account of the failure to do something, or on account of doing something, that actual

damage resulted. In this case the record is absolutely barren in such testimony, there is not any professional expert testimony offered, I mean the testimony of any doctor that in the diagnosis of these cases, Dr. Babcock did not follow the usual ordinary practice of diagnosis in this community. The record is absolutely barren also as to the treatment that was given by the doctor; so there could be no hypothetical question asked as to whether it was the proper or ordinary treatment followed by physicians in this community. In order for plaintiff to recover they would have to show—

“(a) That the first child that died had cerebro-spinal meningitis, a communicable disease. Because there is no testimony in this case that ordinary meningitis is communicable.

“(b) That the doctor knew at once that the child had this disease.

“(c) That the other children took this disease from it, there is absolutely nothing in this record, excepting the testimony that the others died of typhoid fever, all the doctors concur in that, and that is the record in the case, and it seems to me that every element to submit the case to the jury is lacking, and I ask the court to instruct a verdict of no cause of action in favor of Dr. Babcock.”

The motion for a directed verdict was refused, and defendant was directed to proceed with the case. Again, at the close of all the evidence, the said motion for a directed verdict was requested in the following language:

“I want to again renew my motion for a directed verdict in favor of Dr. Babcock for the reasons I have already urged when I made the motion at the conclusion of the plaintiff's case, for the reason that it now shows conclusively on the part of all the doctors who visited those patients, that they had typhoid fever, and you cannot take typhoid fever for spinal meningitis. And even if Dr. Babcock was wrong in his original diagnosis of its being pneumonia instead of meningitis, there would be no blame attached to him because none of the other patients took

meningitis, but all of them typhoid fever. Your honor can see what a dangerous practice it would be, if we were to come in here and on the testimony of the father, mother and grandmother, those interested, who would detail one after the other all the symptoms, which they seem to know by heart, of spinal meningitis, and then say that the jury can speculate from that, in view of the absolute testimony of four reputable physicians that they had typhoid fever, and allow the jury to speculate whether those children had typhoid fever or spinal meningitis, and it has not been shown that if the doctor did follow the rule in regard to reporting to the health officer, it is shown that the health officer of this State has exonerated him, and if he did violate that rule it has not been shown that any damage came from that."

After a somewhat lengthy colloquy between counsel upon both sides and the court, the court said:

"Well, I think I will submit it to the jury upon those two propositions and reserve the right under the 1915 statute to set aside the verdict, if I am satisfied that it was wrong, or satisfied that I am wrong";

—and the case was accordingly submitted to the jury.

After the verdict, and before judgment, a motion to direct a verdict *non obstante veredicto*, and for a new trial, was entered. It appears to be a sort of combination motion, the request being:

(1) Because the court erred in refusing to direct a verdict for the defendant on the ground that there was no competent evidence showing that the defendant was guilty of any negligence.

(2) Because the court erred in submitting to the jury the question as to whether or not the children of plaintiff died of cerebro-spinal meningitis or typhoid fever, as this question is purely a scientific one, and could only be passed on by the jury, provided there was evidence of some doctor that the plaintiff's children did die of cerebro-spinal meningitis, and the record was absolutely barren of any such testimony.

(3) Because the court erred in charging the jury that the only evidence that the grandchild died of

cerebro-spinal meningitis was the evidence of the family and Dr. Tripp. This was error because Dr. Tripp testified that he never saw the grandchild, and that he saw no symptom of cerebro-spinal meningitis in the Sherwood children.

(4) Because, under the charge of the court, the jury were allowed to speculate as to whether or not the children died of typhoid fever or cerebro-spinal meningitis; which speculation could only be based on lay testimony, as the five doctors who testified stated there were no symptoms of cerebro-spinal meningitis.

(5) Because said verdict is contrary to the great weight of the evidence.

This motion was denied, and judgment entered for the plaintiff upon the verdict.

It should be stated that in the course of the argument of the case to the jury one of plaintiff's counsel used the following language:

"It is for you gentlemen to say whether Dr. Babcock or the insurance company, whose very able attorney is here today—

"Mr. Barbour: We object to that remark; there is no insurance company here today nor in this case at all.

"The Court: There is no insurance company here at all, and the remark is uncalled for."

In the course of its charge to the jury the court used the following language:

"Now, during the progress of the trial, some statements have been made by counsel, and some of them have not been warranted or justified by the testimony. I have tried to intimate to you that the trial should be had upon the testimony that is admitted in the case, and upon that alone, and not upon the statements of counsel, unless they are borne out by the testimony; you may use the statements and arguments of counsel, so far as they are borne out by the evidence in the case, and use them in determining what the facts are; if they have gone outside, then don't use what they have said in going outside for any purpose; be careful

about that, simply confine yourself to the testimony and these instructions I have given you."

In his assignments of error the defendant claims:

(1) That the court erred in denying the motion for a directed verdict on behalf of the defendant made at the termination of the plaintiff's case.

(2) Also in denying the motion for a directed verdict at the termination of the defendant's case.

(3) That the court erred in not declaring the case a mistrial on account of the argument of counsel, above set forth.

(4) Also that the court erred in certain portions of the charge.

(5) And, lastly, that the court erred in denying defendant's motion for a new trial.

1. In the discussion of the case appellant's counsel urged that the rule of law, both in this and other States, is that a physician is not liable for errors in diagnosing a case or for errors in judgment, provided he uses the means ordinarily used by physicians practicing in that or similar communities, and the following cases are cited: *Pelky v. Palmer*, 109 Mich. 561; *Luka v. Lowrie*, 171 Mich. 122 (41 L. R. A. [N. S.] 290).

2. That in order to submit a case of alleged malpractice to the jury, the plaintiff must produce medical testimony to the effect that what the attending physician did was contrary to the practice in that or similar communities, or that he omitted to do something which was ordinarily done in that or similar communities, and on the failure of the plaintiff to produce any such evidence, he has failed to establish his claim, and the following cases are cited: *Farrell v. Haze*, 157 Mich. 374, 379; *Miller v. Toles*, 183 Mich. 252 (L. R. A. 1915C, 595). From a careful reading of this record we are impressed with the fact that the verdict and judgment entered are contrary to the great weight of the evidence in the case. Defendant

has, however, failed to file any exceptions to the refusal of the court to grant a new trial. That matter, to wit, that the verdict was contrary to the great weight of the evidence, is embraced in the motion for a directed verdict *non obstante veredicto*. The statute is peculiar upon that subject and provides (Act No. 217, Pub. Acts 1915, § 1 [3 Comp. Laws 1915, § 14568]):

"If such request is denied an exception in favor of the party making such request shall follow as a matter of course."

The question as to the weight of evidence is akin to the questions raised upon the motion for a directed verdict. We are impressed with the claim that a judgment should have been entered in favor of the defendant notwithstanding the verdict of the jury, and that the court erred in overruling such motion. A careful reading of the testimony of Dr. Tripp shows that it falls far short of furnishing evidence that any of the children had cerebro-spinal meningitis. He used the words "possibility," "suspect" and "perhaps." The testimony was too problematical and speculative to warrant the submission of the question to the jury. It gave the jury an opportunity to speculate, and the evidence failed to make a case of malpractice.

We are also impressed with the claim that it was prejudicial error for counsel to use the language he did in the argument to the jury, as above set forth. This language was not only improper, but was reprehensible, and was used without any provocation, there not being a word of testimony in the case with reference to an insurance company. We had occasion in the case of *Morrison v. Carpenter*, 179 Mich. 207, 221 (Ann. Cas. 1915D, 319), to reverse a case for the improper argument of counsel—one where the language used was no more damaging than it was here, and a large number of cases are there cited. See, also, *Peter v. Railway Co.*, 121 Mich. 324, 330 (46 L. R. A.

224). As the case must be reversed on other grounds we need not determine whether this error was cured by the charge of the court.

Upon the whole record we think that the plaintiff failed to make out a case. Even from the testimony of Dr. Tripp as to assumed symptoms which would cause one to "suspect" the presence of cerebro-spinal meningitis, there was not sufficient evidence upon that subject to warrant the submission of the case to the jury. The charge gave them an opportunity to speculate as to whether cerebro-spinal meningitis was present or not in the family of the plaintiff.

For the reasons above stated, the judgment of the court below is reversed with costs to appellant. Judgment notwithstanding the verdict is ordered to be entered for the defendant in accordance with the statute, and the case is remanded for such purpose.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

THIEDEMANN v. MICHIGAN STATE BOARD OF DENTAL EXAMINERS.

1. MANDAMUS—JUDICATURE ACT—ISSUES FORMED BY PLEA TO RETURN—DETERMINATION.

Under section 4, chap. 36, of the judicature act (3 Comp. Laws 1915, § 13440), which supersedes sections 9970, 9971, 3 Comp. Laws 1897, the person prosecuting the writ of mandamus may plead to any or all of the material facts contained in the return, and such issue of fact shall be determined as in other cases; but all material facts stated in said return not specifically denied shall be taken to be admitted as true.

2. SAME—REFERENCE TO CIRCUIT COURT TO TAKE TESTIMONY ON ISSUES.

Where plaintiff's plea denied all of the material statements in defendant's answer, but the material facts necessary to the disposal of the issues thus formed are not available to this court, the case will be referred to the circuit court to take testimony thereon and return same to this court with the opinion of the court thereon.

3. SAME—AFFIDAVITS IN SUPPORT OF RETURN.

Ex parte affidavits in support of the return, filed four or five months after it was filed, cannot be considered by this court, since affidavits of others than the defendant, attached even to the return, are properly no part thereof.

Mandamus by William L. Thiedemann to compel the Michigan State board of dental examiners to issue a license for the practice of dentistry. Submitted October 28, 1919. (Calendar No. 28,785.) Remanded to the circuit court of Kent county for the taking of testimony December 23, 1919.

Charles G. Turner, for plaintiff.

William K. Klute, for defendant.

PER CURIAM. In May, 1918, this plaintiff, as petitioner, presented his petition to this court, sworn to May 3, 1918, praying that a writ of mandamus might issue directed to the defendant board, commanding it to cause a license to be issued to him under sections 3 and 5 of Act No. 338 of the Public Acts of 1907, as amended by Act No. 183 of the Public Acts of 1913 (2 Comp. Laws 1915, §§ 6750, 6752), to practice dentistry in this State. He represented that, in the fall of 1917, desiring to locate and practice his profession in this State, he made such application for an examination as to his proficiency in his profession. He represented that he successfully passed the examination required of him by the defendant board, and that he had never received his license to practice den-

tal surgery in this State, and that the board refused to give the same to him.

An order to show cause why the writ of mandamus should not issue was made, and the board made return and answer thereto. Among other things it was specifically stated in the return of said defendant board that the petitioner had failed to pass his examination on certain subjects, and was not entitled to a license to practice under the laws of the State of Michigan. This return was not traversed by any plea; and this court, applying the somewhat technical rule of the statute, held that the answer of the defendant board, in the absence of a plea, must be taken as true and conclusive, and for that reason the writ of mandamus was denied. (See 204 Mich. 151.)

In April, 1919, the petitioner presented the petition in the instant proceeding, under section 10 of the said acts, praying to be licensed and registered by the defendant board to practice dentistry and dental surgery in the State of Michigan; that such application was made on the 2d day of April, 1919; and that said application was refused by the defendant board. The return of the defendant board stated, among other things, that the equality of the standards recognized as a matter of comity between the States of Wisconsin and Michigan pertaining to the practice of dentistry and the reciprocal issue of licenses was regulated between the dental boards of the two States under a contract for the purpose of effecting a mutual understanding, executed by their respective dental boards, and a true copy of such contract, called a "reciprocity contract," was set forth in said answer in full. The return averred that the said contract was on file and a part of the records of the defendant board, and had been in operation between the two States since the 29th day of May, 1917, the date of its execution, and was still in force; that it constituted

a part of the rules and regulations of the defendant board with reference to the application for license of registrants coming from the State of Wisconsin and seeking a license to practice dentistry in the State of Michigan, and that no other or different regulations touching that subject were in force between the two States. The return further stated that dental registrants from no State in the Union not having reciprocal contracts with Michigan of like terms, as shown in said contract, were granted licenses by the board, without such registrants seeking license in Michigan should have first passed a full examination by said board upon both practical and theoretical dentistry; and that all registrants from such States were uniformly required to take and pass such examination in practical dentistry, as set forth by defendant in the former mandamus case of petitioner; that all registrants from numerous States, including Wisconsin, seeking license to practice dentistry in Michigan, were required, among other conditions, to take and pass an examination in practical dentistry before in any event being entitled to practice dentistry in Michigan. It further stated that the dental board of the State of Wisconsin did not accord to residents of Michigan, dental registrants seeking license to practice dentistry in that State, any other or different privileges or rights than such as are provided in the said reciprocity contract, and does not issue licenses to Michigan dental registrants applying for licenses to practice dentistry in Wisconsin, merely upon presentation of a license from the Michigan dental board. We shall not here set forth all the statements contained in the return of the defendant board, as the same are readily found in the record.

Upon the filing of said return, the plaintiff and petitioner filed a plea, in which every substantial allegation of fact contained in said answer was denied,

thus forming an issue as to nearly every allegation contained in the return of defendant board. It thus appears that this controversy is before this court for the second time. We have been, and are, desirous of disposing of the case upon its merits, but cannot do so in the present state of the record. Section 4 of chapter 36 of the judicature act, being section 13440 of the Compiled Laws of 1915, which is a re-enactment in part of and supersedes sections 9970 and 9971 of the Compiled Laws of 1897, provides as follows:

“Whenever a return shall be made to any such writ, the person prosecuting the same may plead to all, or any of the material facts contained in said return; and such issue of fact thus joined, shall be determined as in other cases: *Provided*, That all material facts stated in said return, that are not specifically denied by the plea, shall be taken as admitted to be true. In case no plea is filed to such return the cause shall stand for hearing upon the petition and return. Such issue of fact shall be tried in the county within which the material facts are alleged to have taken place.”

In referring to the statute which has been merged into the present statute, Justice CAMPBELL, speaking for the court, in *Township of Roscommon v. Midland Supervisors*, 49 Mich. 454, 457, said that its provisions relate to cases where the writ of mandamus had been issued in the first place, and a return had been made to it under which issues were made of fact or law; but he goes on to state that substantially the same practice obtained where an order to show cause had been made, and a return filed thereto. Formerly in this State in mandamus cases the only pleadings contemplated were the relator's petition and the respondent's answer or return; and if the relator desired to controvert the facts stated in the answer issues were formed under the direction of the court. See *Lewis v. Detroit Board of Education*, 139 Mich. 306.

Under the present practice this issue is now formed

by the filing of a plea under the modified statute above set forth; and hence we held that, in the instant case, there was no occasion for framing issues, as the issues are already presented by the plea of the petitioner. The record showing that by the plea substantially all the material statements contained in the return of the defendant board are denied, we find it impossible to lay our hands upon facts in the case necessary to its disposal. For instance, desiring to look into the so-called reciprocity contract, we are confronted with the plea, which denies the very existence of such contract. The fact that such contract was made and exists, as well as the facts upon the claimed practice of the respective boards thereunder, cannot be disposed of without testimony in the case. It is true that the plea of petitioner, and argument of his counsel, goes largely to the question of the validity of any such claimed contract, but the fact of its existence being denied renders it impossible, upon this record, for us to consider it at all. We defer expression of opinion upon the validity of such contract, if one is shown by the evidence to exist, and to be in operation, until final decision of the case.

Another difficulty that confronts us with the present record is that we are asked by the defendant board to consider numerous *ex parte* affidavits in support of the return of the board, but filed four or five months after such return was filed. It has been held in this State that affidavits of others than the defendant, attached even to the return, are properly no part thereof. See 2 Stevens' Michigan Practice, p. 407, and Michigan cases there cited. This is an additional reason why testimony should be taken in this case. We have here presented the anomalous condition of square issues of fact, without any evidence upon the subjects.

A perusal of the pleadings, so-called, makes clear the issues formed by the plea. We think it our duty,

in view of the public interest involved, to refer these issues to the circuit court for the county of Kent, that testimony offered by either party may be taken and returned to this court. A reference to the circuit court for the county of Kent to take testimony on the issues formed by the plea is hereby made. Such testimony will be returned to this court by the judge of said circuit court, together with his opinion thereon, with all convenient speed, and in the meantime the determination of the case will be withheld.

GRAVES v. TOWNSHIP OF DORR.

1. JUDGMENT—NON OBSTANTE VEREDICTO—DISAGREEMENT OF JURY.

In a case where the jury have disagreed and been discharged, and the case continued over the term, the circuit judge cannot afterwards enter a judgment *non obstante veredicto* on the motion made therefor upon the trial, since the statute, section 1, Act No. 217, Pub. Acts 1915 (3 Comp. Laws 1915, § 14568), contemplates that a verdict must be entered and must be adverse to the party making such request.

2. TRIAL—DISAGREEMENT OF JURY—RIGHT TO JURY TRIAL.

Under 3 Comp. Laws 1915, § 12625, when the jury disagrees and is discharged, that trial is ended, and the parties are entitled to another jury trial.

Error to Allegan; Cross (Orien S.), J. Submitted October 24, 1919. (Docket No. 36.) Decided December 23, 1919.

Case by Robert P. Graves against the township of Dorr for personal injuries. Judgment for defendant

on a directed verdict after a disagreement of the jury. Plaintiff brings error. Reversed.

Cornelius Hoffius and Fred P. Geib, for appellant.

Wilkes & Stone, for appellee.

STONE, J. This action was brought to recover damages for personal injuries sustained by the plaintiff when an automobile in which he was a passenger tipped over into a ditch at the end of a bridge spanning the "Bisbee Drain," so-called, which crossed the highway on the township line between the townships of Leighton and Dorr in Allegan county. The defendant had charge of the part of the highway where the injury occurred. There was a jury trial. Upon the trial it was the contention of the defendant that plaintiff could not recover for the reason that the driver of the automobile was guilty of contributory negligence, which negligence was imputable to the plaintiff. At the close of the plaintiff's case, and again at the close of all the testimony, defendant's counsel moved for a directed verdict in its favor. The trial court reserved its decision, and announced that it would submit the case to the jury under the Empson act, so-called (Act No. 217, Pub. Acts 1915 [3 Comp. Laws 1915, § 14568 *et seq.*]). The case was submitted to the jury under a lengthy charge. The jury retired about three o'clock in the afternoon, and after remaining out until about five o'clock on the day following, were dismissed by the court without having reached an agreement; and thereupon the following order was entered upon the journal of the court on January 3, 1919:

(Omitting title of court and cause.)

"In this cause the jury returned into court that they are unable to agree upon a verdict. Thereupon it was ordered by the court now here that the jury be excused from further consideration of this cause, and that the said cause be continued, for trial at the next term of this court."

Thereafter, and on January 8, 1919, the attorneys for the defendant entered a motion, and noticed the same for hearing,—

“for a decision of the motion made and entered by the attorneys for the defendant in said cause at the close of the testimony and before the case was submitted to the jury, requesting the court for a directed verdict in its favor. And, requesting the court to enter judgment in said cause in favor of the defendant, for the reason that under the undisputed evidence in the case, the plaintiff, and Roy Stephenson, the driver of the automobile, were guilty of contributory negligence, and for the reason that the plaintiff being guilty of contributory negligence under the undisputed facts, is not entitled to recover.”

Plaintiff appeared in opposition to said motion, and objected to the granting of the same for the following reasons:

“1. Because in case of a disagreement of a jury, it is the duty of the court under section 12625, 3 Comp. Laws 1915, to order the case tried before another jury.

“2. Because under the Empson law, so-called, the same being Act No. 217 of the Public Acts of 1915, this court has no jurisdiction to direct a verdict after the jury is dismissed.

“3. Because under the Empson law the power of the court is limited to the entering of a judgment, notwithstanding the verdict; and where there is no verdict upon which to act, as in the case at bar, the court has no authority to enter any judgment, but must order the case retried before another jury.”

Thereafter, and on January 18, 1919, the said motion and objections were argued before the trial judge. On April 9, 1919, the learned trial judge filed his decision of the motion in which, after alluding to the motion for a directed verdict, he said:

“Decision upon the motion was reserved, and the case submitted to the jury. The jury were unable to agree upon a verdict, and the motion was renewed. From the testimony it appears that the driver of the automobile was guilty of contributory negligence. and

that plaintiff cannot recover because of such contributory negligence. It is therefore ordered that the motion of said defendant be granted, and a judgment of no cause of action be entered."

And on June 30, 1919, a formal judgment was entered for the defendant.

Plaintiff has brought error, and by his assignments of error, numbers 26 to 32 inclusive, he raises the same questions as were presented in his objections to the motion for judgment. The question is here squarely presented whether, in a case where the jury have disagreed and been discharged, and the case continued over the term, the circuit judge can afterwards enter a judgment on the motion for a directed verdict made upon the trial.

If it can be done, authority for such practice must be found in the Empson act, so-called. Section 1 of that act is as follows:

"Hereafter in all civil actions at law, in courts of record, if either party shall at the close of the testimony, and before the case is submitted to the jury, request the court for a directed verdict in his favor, the court may reserve his decision thereon, and submit the case to the jury under proper instructions as to the law applicable to such case. After the case is thus submitted to the jury, or after receiving and recording the verdict of the jury and before judgment is entered in said case, the court may hear arguments of counsel for and against said request, but in all such cases shall receive and record the verdict of the jury as rendered. If the court shall then decide as a matter of law, that the party requesting the directed verdict was entitled thereto, and if the verdict of the jury is adverse to the party making such request, the court shall enter its decision on the record and order judgment in accordance with such decision notwithstanding the verdict entered, and the party against whom such judgment is entered shall have an exception to such action of the court as a matter of course. If such request is denied an exception in favor of the party making such request shall follow as a matter of course."

We have no doubt that at any time before the jury are discharged from consideration of the case the trial court may direct a verdict and judgment. But after the jury have disagreed and have been discharged, we think that the circuit judge has no power to enter a judgment in the case. Section 12625, 3 Comp. Laws 1915 (being a part of the judicature act and approved later than was the Empson act), provides that if the jury cannot agree, after being kept together for such a time as shall be deemed reasonable, they shall be discharged, and another jury drawn; "and the same proceedings shall be had before such new jury as might have been had before the jury so discharged." When the jury were discharged, that trial was ended,—was nugatory and futile. And the plaintiff was entitled to another jury trial.

A judgment *non obstante veredicto* is a judgment entered by order of the court for one party, although there has been a verdict for the other party. And the motion for the judgment can be made only by the party against whom the verdict goes. 23 Cyc. p. 778. See also Black's Law Dictionary—title "*Non Obstante Veredicto*."

Section 1 of the Empson act, above quoted, requires that "in all such cases (the court) shall receive and record the verdict of the jury as rendered." Manifestly, this could not be done where, as here, there was no verdict to receive and record. It is also provided that if the court shall then decide, as matter of law, that the party requesting the directed verdict was entitled thereto,—

"and if the verdict of the jury is *adverse* to the party making such request, the court shall enter its decision on the record and order judgment in accordance with such decision *notwithstanding* the verdict entered."

It certainly cannot be said here that "the verdict of the jury" was adverse to the moving party, because

there was no verdict. It must be held that unless a verdict was returned by the jury there cannot be, under the Empson act, a judgment *non obstante verdicto*.

We also think that upon this record the court had, by its order of continuance, lost jurisdiction to enter a judgment at that term of the court. We are of the opinion that the judgment appealed from was void, and should be reversed and vacated, with costs to plaintiff, and the case remanded to the jurisdiction of the trial court for trial. It is so ordered.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

MEREDITH v. MCCORMICK.

1. LANDLORD AND TENANT—LEASE—DESCRIPTION OF PREMISES BY STREET NUMBER.

The lease of a house by street number included so much of the lot on which the building stood as was necessary to the complete enjoyment of the building for the purpose for which it was let, and nothing more.

2. EVIDENCE—PAROL EVIDENCE—VARYING TERMS OF WRITTEN LEASE.

The intent of the parties to a written lease is to be found by an examination of the lease, and parol evidence of the understanding of the parties is inadmissible to vary its terms.¹

3. LANDLORD AND TENANT—USE OF BACK YARD.

The lessee of a building for a rooming house could lawfully use a portion of the back yard for the purpose of piling wood to be seasoned for use, this being necessary to the complete enjoyment of the building for the purpose for which it was let.

¹On the general rule that parol evidence not admissible to vary, add to, or alter a written contract, see note in 17 L. R. A. 270.

4. **SAME—RIGHT TO USE OF WALK TO REAR ALLEY.**

The lessee was also entitled to the unobstructed use of a cement walk extending from the rear of the building to the alley for the purposes of ingress and egress, removal of garbage, and other like uses, and the building of a garage over the cement walk, thus interfering with access to the alley, would be an encroachment upon the lessee's rights.

5. **SAME—PEACEABLE POSSESSION—INJUNCTIVE RELIEF.**

The lessee is entitled to an injunction restraining the lessor's successor from interfering with lessee's right to pile wood in the back yard, and from building a proposed garage obstructing the cement walk; the latter to be dissolved when a walk shall be built upon the south and west sides of the proposed garage.

Appeal from Wayne; Chester (Guy M.), J., presiding. Submitted October 9, 1919. (Docket No. 19.) Decided December 23, 1919.

Bill by Eph Meredith against William H. McCormick to enjoin the building of a garage. From a decree dismissing the bill, plaintiff appeals. Reversed, and decree entered.

Benjamin & Betzoldt, for plaintiff.

Lodge & Brown, for defendant.

STONE, J. The bill of complaint herein was filed to obtain an injunction restraining the defendant from building a garage upon the rear of certain premises, alleged to be leased to the plaintiff; also to restrain defendant from interfering with, molesting or removing any wood or other materials that plaintiff might put on the premises involved, for his own personal use, that would not interfere with the use of said premises by other tenants. The plaintiff is the tenant and occupant of the house and premises known as 145 Harper avenue, Detroit, under and by virtue of a written lease for five years from the first day of April,

1916, wherein Walter W. Smith was the lessor and the plaintiff was lessee. The defendant has succeeded to the rights of Smith in the premises. The written lease contains the following by way of description of the premises:

"The following described premises situated and being in the city of Detroit, county of Wayne, and State of Michigan, to wit: House No. 145 Harper avenue * * * for the term of five years from and after the first day of April, 1916, on the terms and conditions hereinafter mentioned, to be occupied for a rooming house."

The 8th and 9th paragraphs of the bill of complaint are as follows:

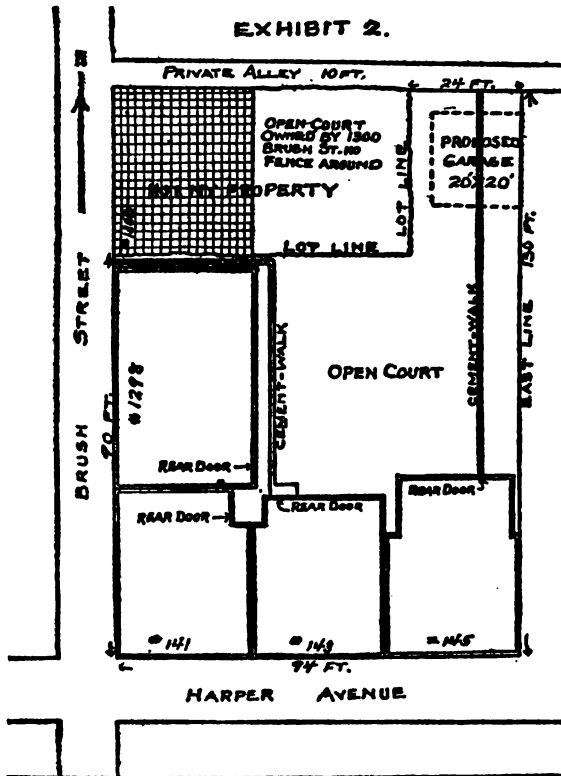
"8. Your petitioner further shows that for the purpose of his home and in order to supply fuel for next winter, he has caused certain green wood to be piled up temporarily, to dry, along the easterly line of said premises, and east of the cement walk which your petitioner has, to go to and from said alley, and that said William H. McCormick, the present owner, defendant herein, now claims that your petitioner has no right to leave said wood there, or to use the back yard of said premises, and has removed some of the wood of your petitioner from off the rear end of said lot, or court.

"9. Your petitioner further shows that the said William H. McCormick, in derogation of your petitioner's rights as a tenant, has torn down the easterly and rear fence, has cut down certain shade trees, and against the express objection and protests of your petitioner, is proceeding to build a large garage on the rear of said lot, which will occupy more than four hundred (400) square feet, and will thereby deprive your petitioner of the use of four hundred (400) square feet of said small back yard or court, which now exists, and that if the said William H. McCormick is permitted to build said garage, it will interfere with the quiet and peaceful possession of your petitioner, and will cut off the enjoyment of a large portion of the present back yard, to which he is lawfully entitled, which loss cannot be fully compensated in damages, and which would be irreparable."

The defendant, by his answer, virtually admits the acts above charged, but claims that the same were not in derogation of any of plaintiff's rights, and denies that plaintiff has acquired any rights by reason of said acts.

The testimony was taken in open court and the bill of complaint was dismissed, the decree stating that the defendant have power and authority to proceed with the erection of the structure in said bill of complaint mentioned, allowing plaintiff access to the alley in the rear of said premises by the four-foot way mentioned in said proofs.

A diagram of the premises, known as Exhibit 2,



hereto appended, will aid in an understanding of the situation.

The house leased and occupied by plaintiff is on the easterly end of a terrace of houses situated on the corner of Brush street and Harper avenue, and there are three separate and distinct houses of the terrace facing on Harper avenue and one facing on Brush street. The width of the house, No. 145, is 30 feet. The other three houses in the terrace are occupied by the defendant for rooming house purposes, and in the rear of No. 145 there is a cement walk that goes direct from the kitchen door to the alley on the north. This sidewalk is used exclusively by the plaintiff and the occupants of his house. There is another cement walk on Brush street that comes around the rear for the accommodation of the other three houses, including the one on Brush street. The other tenants in the terrace do not use any portion of the lot in the rear of the terrace east of the line, if it were extended 24 feet from the east line of the lot. Plaintiff has used exclusively the entire east 24 feet of the lot in the rear of No. 145 Harper avenue. He does not use the other portion of this lot west of the 24-foot line. Plaintiff's business is that of a cement paving contractor, and he had been in the habit of storing, for a short time, wheelbarrows, etc., on the rear of the lot, in what he claimed was his portion thereof. He also piled green wood on the rear end of the lot between the sidewalk and fence on the east line, and would leave it there until it got dry, and then would put it in the basement of No. 145. Referring to the wood, plaintiff testified as follows:

"This spring I had some wood piled on the rear end of this lot, between the sidewalk and the fence, a space of about four feet east of the sidewalk. It was green wood sawed in two-foot lengths for the grate. I put it there until it got dry, and then I put it in the basement. While that wood was there Dr. McCormick

asked me to remove it. I did not remove it and the doctor started some proceedings in the circuit court commissioner's court, and from that court it has been appealed to the circuit court."

He further testified that the defendant interfered with, and removed some of the wood which the plaintiff had piled there. The full width of the rear end of the lot on the alley on the north is 24 feet. The defendant tore down the fence upon the alley and upon the east side near the northeast corner of the premises, and had brought material and had taken steps to erect a garage 20x20, intending to set it back some 8 or 10 feet from the alley line, and directly over the cement walk used by the plaintiff in carrying garbage to his garbage can, which was kept in the alley in the rear of the premises. As soon as the plaintiff found that the defendant had torn down the fence and put some building material upon the premises, preparatory to building the garage, this bill was filed and a temporary injunction was obtained.

The defendant testified as follows:

"My plans contemplate a garage 20x20 in the northeast corner of the lot. That will leave four feet up to my line on the west side of the garage. It is vacant beyond that to the side for 35 feet. Then I will have to set in a little from the alley because it is a narrow alley. I plan to deflect this cement walk where it comes to the garage, and build it around the front of the garage, and then at the side, so that the tenant in 145 will have access to the alley the same as before. The distance from the front of the garage to the back end of the house is 42 feet; that would leave the plaintiff still 42 feet of back yard for clothes lines."

He estimated that setting the garage back 8 feet from the alley would make the space occupied 28x20, or 560 square feet. The defendant testified that that would leave ample room between the garage and the back end of No. 145.

The plaintiff has appealed, and it is claimed that, both as to the interference with the wood which he had piled east of the cement walk, and with reference to the garage proposed to be built over the walk, he is entitled to injunctive relief, and that the court erred in dismissing the bill of complaint. Counsel upon both sides of the case have cited numerous authorities from other jurisdictions. We are of the opinion that the law of the case is substantially settled by the recent case of *Kuschinsky v. Flanigan*, 170 Mich. 245 (41 L. R. A. [N. S.] 430, Ann. Cas. 1914A, 1228). That was a case of leasing by the street number, and it was held that it included so much of the lot upon which the building was situate as was necessary to the complete enjoyment of the building for the purpose for which it was let, and nothing more. Citing 24 Cyc. p. 1044. Upon the subject of description of premises, see, also, *Nowicki v. Kopelczak*, 195 Mich. 678.

It is the contention of the defendant that the plaintiff, having leased 145 Harper avenue, he did not lease the building and its appurtenances, but only the house. He contends:

"He therefore had no right to anything but the house, and he has not been denied any right in the occupancy of the house."

We think this is too narrow a view of the matter. There was testimony offered and received tending to show the understanding of the parties independent of the written lease. We think evidence could not be introduced to vary the terms of the lease. The intent of the parties is to be found by an examination of the lease. There ought not to be much question about the law that should govern this case, for defendant's counsel say:

"We accept counsel's statement of the law applicable to this case. The general rule is that a description of premises in a lease of the building by the street

number, includes so much of the lot upon which the building is situated, as is necessary to the complete enjoyment of the building for the purpose for which it was let, and nothing more.' ”

Defendant's counsel contend, however, that a different rule should be applied to a rooming house from that of a dwelling house. It is very apparent that a rooming house in Michigan climate must be heated, as well as a dwelling house. We think the use of the portion of the back yard between the cement walk and the east line of the premises might lawfully be used by the plaintiff for the purpose of piling wood to be seasoned for use. That was, in our opinion, necessary to the complete enjoyment of the building for the purpose for which it was let.

We think that plaintiff was also entitled to the unobstructed use of the cement walk extending from the rear of No. 145 to the alley, for the purposes of ingress and egress, and for the purpose of removing garbage, and other like uses; and when the defendant proposed to build a garage over the cement walk, thus interfering with access to the alley, he encroached upon the plaintiff's rights as a tenant.

It is true that the defendant testified that he planned to deflect this cement walk where it comes to the garage and build it around the front of the garage and then at the side, so that the tenant would have access to the alley the same as before. There is no claim by defendant that this has been done. We are of the opinion that the plaintiff will have no just cause to complain of the garage when such proposed cement walk is built around the south and west sides of the garage to the alley. Until that is done the plaintiff has a right to have the defendant restrained. We think the decree below should be reversed, and instead of dismissing the bill, we think the plaintiff is entitled to an injunction restraining the defendant

from interfering with, or molesting or moving any wood that the plaintiff may put on the east side of the cement walk for the purposes described; and that such piling does not in any manner interfere with the use of said back yard or court by the other tenants in the terrace.

We are also of the opinion that the plaintiff is entitled to an injunction restraining the defendant from erecting the garage at the place mentioned, until such time as he shall have built upon the south and west sides of the proposed garage a walk to the alley. When that is done so that the plaintiff has access to the alley over the cement walk, we think the injunction as to the garage should be dissolved, as the same would not materially interfere with the covenant for peaceable possession contained in the lease.

The decree below will be reversed and a decree prepared in accordance with this opinion, with costs of both courts to the plaintiff.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

ROY v. KIRN.

1. RELEASE—REPUDIATION — IMPEACHMENT — EVIDENCE — ADMISSIBILITY—RETURN OF MONEY.

Where plaintiff, in an action for personal injuries, denied ever knowingly or understandingly signing a release, or receiving any money therefor, defendant's claim that evidence impeaching the release was inadmissible because

plaintiff had not offered to return the money claimed to have been paid cannot be sustained.

2. **MOTOR VEHICLES—EVIDENCE—NEGLIGENCE—QUESTION FOR JURY.**

Evidence as to rate of speed at which defendant was driving his automobile, and as to his intoxication, at the time of the accident, *held*, sufficient to carry the case to the jury.

3. **SAME—NEGLIGENCE—DUTY TO GUEST.**

Where an owner is gratuitously carrying a guest in his automobile he must be mindful of the life and limb of his guest, and shall not unreasonably expose him to an additional peril, a guest only assuming the risks ordinarily arising from riding in an automobile when the machine is controlled and managed by a reasonably prudent man who will not, by his own want of due care, increase his danger or subject the guest to a newly-created danger.

4. **NEW TRIAL—WEIGHT OF EVIDENCE.**

It cannot be said that the verdict was overwhelmingly against the weight of the evidence so as to call upon this court to interfere with it.

5. **SAME—NEWLY-DISCOVERED EVIDENCE—ABSENT WITNESS.**

The trial court was not in error in denying a motion for a new trial on the ground of newly-discovered evidence, where the record shows that the case had been at issue for more than a year, and in less than a month after the trial the whereabouts of the absent witness was discovered.

6. **SAME—NOT FAVORED.**

Motions for new trials on the ground of newly-discovered evidence are not favored by the courts.

7. **SAME—AFFIDAVITS—CONCLUSIONS.**

An affidavit for a new trial, alleging that affiant made diligent search for an absent witness, without setting forth the efforts made, states but a mere conclusion.

8. **MOTOR VEHICLES—NEGLIGENCE—MOTOR VEHICLE LAW—DUTY TO GUEST.**

The provisions of the motor vehicle law (1 Comp. Laws 1915, § 4825), providing that the owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation thereof, whether such negligence consists in the violation of the provisions of the statutes of the State

or in failing to observe such ordinary care in such operation as the rules of the common law require, apply as between the owner of a car driving the same and an occupant thereof riding gratuitously as a guest.¹

Error to Wayne; Webster (Clyde I.), J. Submitted October 30, 1919. (Docket No. 76.) Decided December 23, 1919.

Case by James M. Roy against Alfred Kirn and another for personal injuries. Judgment for plaintiff. Defendant Kirn brings error. Affirmed.

William J. Bane, for appellant.

Henry C. L. Forler, for appellee.

STONE, J. This case was originally begun against Alfred Kirn and Henrietta M. Glazier, there being two counts in the declaration. The first count alleged negligence of the defendant Kirn, and the second count alleged negligence of defendant Glazier. Upon the trial, and at the close of the plaintiff's evidence, the court directed a verdict and judgment for the last named defendant, and the trial proceeded against defendant Kirn, resulting in a verdict and judgment for the plaintiff in the sum of \$2,000 damages and costs.

The first count of the declaration alleges that on March 3, 1916, defendant owned and had in his possession an automobile, and that on that date, at the special instance and request of the said defendant, the plaintiff became and was a passenger in, and an occupant of said automobile, while being driven by said defendant in a northerly direction on Woodward avenue in the city of Detroit and the village of Highland Park; that said defendant, in violation of his duty and of the statute, and of the ordinances of the village of Highland Park, drove the said automobile at a high rate of speed, contrary to the statute of the State, and

¹On question of liability of owner or operator of automobile for injury to guest, see notes in 50 L. R. A. (N. S.) 1100; L. R. A. 1916E, 1190, L. R. A. 1918C, 276.

in violation of said ordinances; that at the intersection of Grand avenue and Woodward avenue in the village of Highland Park the said defendant, while driving the said automobile at a high and reckless rate of speed, ran into and collided with the automobile belonging to the defendant Henrietta M. Glazier, which latter automobile was then and there crossing Woodward avenue at the intersection of Grand avenue; that the automobile of the said defendant ran into the said automobile of Henrietta M. Glazier with such force and violence that the plaintiff was thrown out of the car upon the pavement, suffering serious and permanent injuries, as follows: That when thrown from the said automobile to the pavement, as aforesaid, plaintiff struck on his head, fractured his skull and was otherwise injured in and about the body, arms and legs; that the injury to his skull then and there sustained was permanent and incurable, and as a result thereof his eyesight has been affected and his health permanently impaired; that he suffers as a result of the said injuries severe and painful headaches, spasms and convulsions; and because of said injuries his health is destroyed.

The plea of the general issue of the defendant Kirn was filed on June 7, 1917. At the opening of the trial, which occurred June 25, 1918, the said defendant moved to amend his plea of the general issue by giving notice of a compromise and settlement, with release, which motion was granted. Without detailing the evidence here, it is sufficient to say that there was a sharp conflict in the evidence as to the rate of speed of the car of the defendant immediately before the collision, the rate of speed varying by the testimony from 15 to 40 miles an hour; and there was evidence of the intoxication of the defendant, which was denied. A reading of the evidence satisfies us that it was sufficient upon the subject of the negligence of the de-

fendant to carry the case to the jury, and to sustain the verdict and judgment.

At the close of the plaintiff's testimony counsel for said defendant moved for a directed verdict in his favor, on the grounds that defendant owed no duty to an occupant of his car, who was not a passenger for hire, to maintain such a slow rate of speed that he might have avoided the accident when he saw the danger; that there was no evidence of a willful, malicious increasing of the danger, or the creation of a new danger. Said motion was denied and exceptions duly taken, and the defendant introduced the testimony of numerous witnesses in the case. In his defense the defendant offered in evidence two papers reading as follows:

"DETROIT, MICH., October 19, 1917.

"To whom it may concern: In the auto accident that occurred on March 11, 1916, I hold no blame whatever to Mr. Al. Kirn, and am bringing suit against Mr. Glazier, and am bringing suit only against Mr. Glazier, Mr. Kirn was at no blame whatsoever for accident.

(Signed) "JAMES ROY."

Also the following:

"October 19, 1917. Received of Alfred Kirn \$35 for full settlement of all claims against him on account of an accident that occurred at Grand avenue and Woodward avenue, on March 3, 1916.

(Signed) "JAMES ROY."

"Witnesses:

"W. K. KNIPPRATH,
"JOHN DARBY."

The defendant testified that he paid the plaintiff \$35 for a release of his said claim, and that plaintiff signed the release and receipt and delivered them to him.

The plaintiff testified and offered proof to show that he had no knowledge or recollection of having signed

said papers, although he thought the signatures were his; that if he did sign them it was on an occasion, detailed by him, when he was so intoxicated that he did not know what he was doing. He also testified that he had not knowingly received any money in settlement. This testimony of the plaintiff was objected to by defendant's counsel because no offer had been made to return the \$35 to the defendant, the language of counsel being as follows:

"I object to his impeaching this release for the reason that Mr. Roy has not returned the \$35, and he cannot object to the contract and retain the money he has received."

This objection was overruled, and the testimony pro and con with reference to said papers and payment was received in evidence and submitted to the jury. Upon that subject the court charged the jury as follows:

"20. If this receipt or release that has been introduced in evidence was entered into by him knowingly, that is, understandingly, knowing what it was, then he cannot recover in this action, even though he had a right of action; and you are also not concerned with the amount or the size of that release, the \$35, because no matter how good an action he had, or how much money he would be entitled to recover, if he knowingly releases that right of action for \$35, he has got a right to do that, and the defendant has—and the defendant is entitled to the protection of it and the plaintiff is bound by it. On the other hand, if he has a right of action against the defendant and the defendant secures the release from him through any means of fraud or because the plaintiff was intoxicated, or for any condition of the plaintiff he did not understand what he was doing, or did not know what he was doing, why then of course the release would have no binding force or effect upon him. So that you must determine that proposition in this case, as well as the other. If he knowing and understandingly executed this release he cannot recover in this action, no matter how good

a claim he has got, and your verdict should be no cause of action. On the other hand, if you believe that the release was secured from him while he was in a condition not to understand what he was doing, then he is not bound by the release and you may bring in a verdict for the plaintiff.

"21. Now, that leaves the one further—and I charge you in that regard on behalf of the defendant that a release understandingly made for a consideration is a bar to an action for the injury for which same is given. The amount paid does not affect the validity of a release."

Upon the main questions in the case the court charged the jury, in part, as follows:

"4. As to the defendant: Did the defendant do what an ordinarily prudent person would do under similar circumstances? Or, did he fail to do what an ordinarily prudent person would do under similar circumstances? That is a good test. Because, if he did, then he is not liable and your verdict should be no cause of action. And if he did not do, as he approached this corner in driving this car, if he did not do or act as an ordinarily prudent person would do under similar circumstances, then he is guilty of an act of negligence and the plaintiff may be entitled to recover, providing you also find the other elements that I will explain to you.

"5. Now, in this particular case, the rule, as I say, is somewhat different than in the ordinary case, because this plaintiff was either a guest or a licensee, and as I view the law, the rule is no different whether he is a guest or a licensee, so you will not have to struggle over that problem. The testimony is conflicting on that point. He says he was invited to ride. That would make him a guest. The defendant says that he invited himself. That would make him a licensee. So, of course, it is for you to determine whether he was invited to take this ride by the defendant, or whether he invited himself. One way he would be a guest and the other way a licensee. But, as I say, I do not think you need bother about which way that is, because the rule is about the same any-

way. In other words, the rule is, as to a guest or a licensee, that the defendant, to be liable, must do some act that either increased the danger, or created a new danger, for, if you are invited to ride in a car by a man, or if you invite yourself, either way, you assume the risks, that would naturally attach to riding in such a vehicle; that is, you know that there are certain dangers that are incident to an automobile and to riding in an automobile, and if you accept an invitation to ride, or you invite yourself, either way, you assume those ordinary risks and if an accident happens in that way then the driver is not liable to you. But if he does some act that increases those ordinary dangers, or creates a new danger entirely, then he is liable.

"6. And so as to that point in this case you have to determine that. Did the defendant Kirn do any act that increased the danger of riding in an automobile, or that created a new danger? If he did he is liable, and if he did not he is not liable.

"7. Now, if you believe the testimony of the plaintiff's witnesses, that at the time that Glazier stopped his car, and you believe that he did stop his car, on the northwest corner of Grand and Woodward to let out this man and the time he started up from there to cross the street — Woodward avenue — if you believe that the defendant Kirn in his automobile was a block away and was coming as testified to by some of the plaintiff's witnesses, from 35 to 40 miles per hour, and that when Glazier in his car had got across the street car tracks into the space on Woodward between the car tracks and the curb, that the defendant Kirn in his car had reached a point about the safety zone, or about 10 feet therefrom, and still coming at 35 or 40 miles per hour, and at that point he applied his brakes, or started to put on his brakes, and skidded 50 or 60 feet and hit this Glazier machine, and driving them both 25 or 30 feet beyond that after striking him—I say, if you believe all those facts you can find from that evidence, that the defendant Kirn did an act which increased the danger of riding in an automobile and from that you could find him liable."

"10. This rule in regard to the guest or licensee may be stated in this way: that anyone knowing that

there is always some danger in traveling in an automobile, who accepts an invitation to ride, as the guest of the driver, assumes the risk of the ordinary dangers of which he is aware and cannot hold the driver of the car responsible in damages for an accident, if there was no fault or negligence or imprudence on the driver's part. The driver's duty and responsibility is merely to be careful and avoid committing any act of negligence or imprudence that might add to or increase the ordinary danger of the occupation.

"11. In other words, Kirn's duty in reference to the plaintiff was to use ordinary care and not to increase the danger of his riding with him, or to create any new danger. One who invites another to ride is not bound to furnish a safe vehicle, or a safe horse, or a safe automobile, but if the driver fails to use ordinary care in driving the automobile, he thereby creates a new danger for which he is liable."

"23. Mr. Forler calls my attention to the fact that I stated that if he was going 15 miles per hour and did all that he could to avoid the accident that he would not be liable. I did not state the opposite of that, which, of course, would follow and be true, that if he was going 15 miles per hour and saw the car and did not do all that he should have done, all that an ordinarily prudent person would do, to avoid the accident, then, of course, he would be liable.

"24. I give the request handed to me by Mr. Forler: If Kirn was driving 15 miles and saw the other car in sufficient time to stop, it was his duty to do so, and his failure would be negligence. That is, if the other car was crossing when the Kirn car was a long distance away, it became the duty of Kirn to stop, even though he was only driving at 15 miles an hour."

There was a motion for a new trial, alleging, among other things, newly-discovered evidence then in the possession of the defendant, and which, even through the exercise of diligence, he was unable to obtain for use in said trial; that the verdict was wholly unsupported by the evidence; that the verdict and judgment were contrary to the law governing the case; and that the court erred in refusing to grant the mo-

tion of defendant for a direction of verdict in his favor.

In support of the motion for a new trial on the ground of newly-discovered evidence, the defendant offered his own affidavit of the facts which he expected to prove by one Russell J. James, concluding as follows:

"Deponent further says that such evidence has been discovered by him since the said trial, and was not previously known by this deponent to exist, and the same is material to this deponent in said cause as he is advised by his counsel. That he made diligent search for said witness but was unable to locate him."

The affidavit of Russell J. James was offered in support of said motion, which affidavit states as follows:

"I was riding south on Woodward avenue at time of collision in question; that I was about 50 feet in the rear of automobile going south; that I did not see southbound car stop on Woodward avenue; the southbound car was going at between 14 and 15 miles per hour and turned across Woodward to go east on Grand avenue; that it did not stop in crossing, but made a circular turn; that when I first saw the northbound automobile it was just about 30 feet south of Grand avenue and was skidding sideways, with front end facing across Woodward in a northwesterly direction; when I first saw the northbound automobile, the automobile crossing Woodward was on the street car track; that northbound car skidded in all about 35 feet; that when two automobiles came together they did not skid along together, but bounded apart a distance of about 10 feet and were standing that way when I walked over near them; the two cars were standing about midway between east car rail and east curb of Woodward and about the middle of Grand avenue; the driver of the northbound car did not stagger; I did not smell liquor on his breath; he was not intoxicated; there was a light snow falling; the street was slippery."

The motion for a new trial was denied, and defendant excepted. The defendant, Kirn, has brought the

case here by writ of error. The only error assigned relating to the admission of testimony was that with reference to the release and receipt. It is also claimed that the verdict was contrary to the weight of the evidence, and that the evidence was wholly insufficient to prove: (a) Speed at which the car of defendant Kirn was driven; (b) Intoxication of Kirn; (c) Reckless driving of Kirn; (d) Willful and wanton acts by defendant Kirn. Error is also assigned upon each of the foregoing paragraphs of the charge, 4, 5, 6, 7, 10, 11, 23, and 24. Error is also assigned that the court erred in overruling the motion for a new trial.

1. The assignments of error are argued by appellant's counsel and the first one is, that there being no repudiation by the plaintiff of the settlement made, evidence to impeach the release was inadmissible. We are not impressed that there is any merit in this claim. The papers were received in evidence, and the question was submitted to the jury by the trial court in its charge in a very full and explicit manner, and the jury were instructed that if the plaintiff knowingly and understandingly signed the receipt and release, he could not recover in the action. It cannot be said that there was no repudiation by the plaintiff of the settlement. He gave positive testimony that he had never knowingly and understandingly signed any such papers, or entered into any such agreement. It seems illogical to claim that he should have offered to return the \$35 when he denied ever having knowingly or understandingly received the money, or any part thereof. We find no error in this branch of the case.

2. It is next urged that the evidence was insufficient to submit to the jury the question of the rate of speed at which the defendant was driving his automobile, and as to his intoxication. It is sufficient to say that there was testimony of a number of witnesses tending to show that they were so situated that they could

speak with knowledge with reference to both the subject of a high rate of speed and of intoxication; and we cannot say that the evidence was insufficient to carry the case to the jury.

3. The interesting and meritorious question in the case is as to the rule of conduct with which the defendant should be charged, it being the position of appellant that the carriage of the plaintiff was a gratuitous and social undertaking, and that, therefore, the duty owing by defendant was simply to refrain from intentional injury. Counsel for defendant has a very learned and comprehensive brief upon this subject, in which he reviews many cases, both English and American, and urges that the rule which should be applied is that, in order to hold the defendant liable in this case, it must appear that he was guilty of gross negligence. We have spent considerable time upon this question, and have reached the conclusion that the court properly submitted the case to the jury, and gave the correct rule upon the question of negligence. The question may be said to be a new one in this State. An examination of numerous cases has led us to the conclusion that the rule adopted by the Maine supreme judicial court in the case of *Avery v. Thompson*, 117 Me. 120 (103 Atl. 4, L. R. A. 1918D, 205, Ann. Cas. 1918E, 1122), decided February 21, 1918, is a reasonable and sane rule, and one which should be adopted by this court. After reviewing a score of cases that court said:

“The foregoing decisions give expression in varying forms to substantially the same fundamental principle and lead to the same essential inquiry, viz., Did the defendant exercise toward his invited guest that degree of care and diligence which would seem reasonable and proper from the character of the thing undertaken? The thing undertaken was the transportation of the guest in the defendant's automobile. The act itself involved some danger, because the instru-

mentality is commonly known to be a machine of tremendous power, high speed, and quick action. All these elements may be supposed to have been within the contemplation of the guest when she accepted the invitation. In a sense she may be said to have assumed the risks ordinarily arising from these elements, provided the machine is controlled and managed by a reasonably prudent man who will not by his own want of due care increase their danger, or subject the guest to a newly-created danger. In other words, we conceive the true rule to be that the gratuitous undertaker shall be mindful of the life and limb of his guest, and shall not unreasonably expose her to additional peril. This would seem to be a sane, sound, and workable rule; one consistent with established legal principles and just to both parties. It leaves the determination of the issue to the jury as a question of fact."

In reaching that conclusion the court made an exhaustive review of the authorities, and among the cases cited the following are particularly in point: *Pigeon v. Lane*, 80 Conn. 237 (67 Atl. 886, 11 Ann. Cas. 371); *Beard v. Klusmeier*, 158 Ky. 153 (164 S. W. 319, 50 L. R. A. [N. S.] 1100, Ann. Cas. 1915D, 342); *Fitzjarrell v. Boyd*, 123 Md. 497 (91 Atl. 547); *Perkins v. Galloway*, 194 Ala. 265 (69 South. 875, L. R. A. 1916E, 1190); *Mayberry v. Sivey*, 18 Kan. 291; *Patnode v. Foote*, 153 App. Div. 494 (138 N. Y. Supp. 221); *Siegrist v. Arnot*, 10 Mo. App. 197.

It is contended that the contrary rule was laid down by the Massachusetts court in the case of *Massaletti v. Fitzroy*, 228 Mass. 487 (118 N. E. 168, L. R. A. 1918C, 264, Ann. Cas. 1918B, 1088); and in discussing the conclusion reached in that case the Maine court said:

"Notwithstanding these antagonistic statements as to definition, we doubt not that the two courts, from a given state of facts, would be apt to reach the same conclusion as to liability. The difference is more verbal than real."

Our attention has been called by defendant's counsel to the case of *Jacobs v. Jacobs*, a case decided by the Louisiana supreme court, March 12, 1917, and reported in L. R. A. 1917F, at page 253 (141 La. 272, 74 South. 992), in which case it was held that the defendant was not guilty of any negligence, but the proper rule of liability was stated as follows:

"We agree with the learned counsel for the plaintiff, that one who invites another to ride with him as his guest in an automobile is not absolved from responsibility for negligence or imprudence, merely because he is performing a gratuitous service or favor to his guest.

"We agree with the doctrine recognized by the court of appeals of Kentucky in *Beard v. Klusmeier*, 158 Ky. 153, and approved by the court of appeals of Maryland in *Fitzjarrell v. Boyd*, 123 Md. 497, that a guest in an automobile is entitled to demand that his host shall exercise ordinary care for safety in driving the car, and that the latter's liability is not confined to acts of gross negligence or willful recklessness."

We, therefore, find no error in the charge of the court upon this branch of the case.

4. There is no claim here that any negligence of the defendant would be imputable to the plaintiff. This is not an action against third parties, but against the driver of the automobile. The authorities, already cited upon the other branch of the case, fully cover this question, especially the Maine and Louisiana cases.

5. It is urged that the verdict was contrary to the weight of the evidence. Conceding but not deciding that that question is properly here, we are not satisfied that the court erred in denying the motion for a new trial upon this ground. It cannot be said that the verdict was overwhelmingly against the weight of the evidence so as to call upon this court to interfere with it.

6. Upon the question of motion for a new trial upon the ground of newly-discovered evidence, we think

there was no error in denying the motion upon that ground, for numerous reasons. The record shows that this case had been at issue for more than one year before the trial took place. It seems that in less than a month after the trial the defendant was able to discover the whereabouts of this absent witness. It is true defendant states in his affidavit that he made diligent search for said witness, but was unable to locate him. This is a mere conclusion. The efforts made by him are not set forth, and the affidavit is far from being satisfactory upon that subject. Had a little of the diligence used after the trial been exercised during the pendency of the case for a period of one year, it would probably have resulted in finding this witness. Motions for new trials upon this ground are not favored by the courts. *Canfield v. City of Jackson*, 112 Mich. 120. We have set forth the substance of the affidavit of the newly-discovered witness James. Some of it is merely negative, to wit: that portion in which he says he did not see the south-bound car stop on Woodward avenue. The fact that he did not see the car stop would not be very controlling or convincing as to the fact. The remainder of his affidavit relates to matters that would be purely cumulative, and we doubt if the result would have been different had the evidence been produced upon the trial.

7. It is urged by appellant that the automobile statute does not apply as between the driver of a car and an occupant thereof, but only as between the driver, or his principal, and the public. We cannot agree with this claim. Section 4825, 1 Comp. Laws 1915, reads in part as follows:

"The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of such motor vehicle, whether such negligence consists in violation of the provisions of the statutes of this

State, or in failure to observe such ordinary care in such operation as the rules of common law require."

Upon the whole record, and after considering all the points raised and urged by appellant, we find no reversible error, and the judgment below is affirmed.

BIED, C. J., and SHARPE, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

PEOPLE v. WILLIAMS.

1. CRIMINAL LAW—TRIAL—INSTRUCTIONS—REASONABLE DOUBT.

In a prosecution for having sexual intercourse with a female by representing it to be beneficial to her health, while undertaking to treat her medically, in violation of 3 Comp. Laws 1915, § 15505, the charge of the court to the jury that if they believed that the complaining witness consented, as testified to by the defendant, then he should be acquitted, was not open to the objection that the court failed to instruct, in connection therewith, the effect of said testimony in raising a reasonable doubt, where the court fully instructed them, in another part of the charge, as to reasonable doubt, defining the same.

2. SAME—CHARGE AS WHOLE.

The correctness of the charge cannot be tested by taking particular parts, but must be taken as a whole.

3. SAME—INSTRUCTIONS—INFERENCES FROM FACTS.

The charge of the court to the jury that they were the sole judges of the facts, and it was for them to determine who was telling the truth, and what inferences should be drawn from the testimony, was not open to the objection that it was too indefinite and uncertain and gave the jury

to understand that they were not limited in their inferences as to facts.

4. SAME—INSTRUCTIONS—DEFENDANT'S INTEREST.

In the absence of any request to charge differently, it was not reversible error, as unduly emphasizing his interest, for the trial court to charge the jury that they should give defendant's testimony the same consideration as the testimony of any other witness, except that they might consider his interest in the outcome of the case.

5. SAME—INSTRUCTIONS—PRESUMPTION OF INNOCENCE—REASONABLE DOUBT.

Failure to instruct the jury, in a criminal case, as to the presumption of innocence, is not reversible error, where the attention of the court was not called to the omission, and the charge as given was explicit and to the effect that the guilt of the accused must be proved beyond a reasonable doubt.

6. SAME—APPEAL AND ERROR—MISCARRIAGE OF JUSTICE.

Where it cannot be said that omission to charge as to the presumption of innocence resulted in a miscarriage of justice, in view of Act No. 89, Pub. Acts 1915, the case should not be reversed therefor.

Error to recorder's court of Detroit; Jeffries (Edward J.), J. Submitted October 16, 1919. (Docket No. 109.) Decided December 23, 1919.

Oscar H. Williams was convicted of violating section 15505, 3 Comp. Laws 1915, and sentenced to imprisonment for not less than 5 nor more than 10 years in the State prison at Jackson. Affirmed.

A. O. Reece, for appellant.

Alex. J. Groesbeck, Attorney General, *Matthew H. Bishop*, Prosecuting Attorney, and *Herman H. Greenberg*, Assistant Prosecuting Attorney, for the people.

STONE, J. The defendant was convicted in the recorder's court for the city of Detroit of a violation of

section 15505, 3 Comp. Laws 1915, which statute provides:

"That if any person shall undertake to medically treat any female person, and while so treating her, shall represent to such female that it is, or will be, necessary or beneficial to her health that she have sexual intercourse with a man, and shall thereby induce her to have carnal sexual intercourse with any man, or if any man, not being the husband of such female, shall have sexual intercourse with her by reason of such representation, the person or persons so offending shall, on conviction thereof, be punished by imprisonment in the State prison for any term of years not exceeding ten years."

Upon his conviction the defendant was sentenced to imprisonment in the State prison at Jackson, where he is now confined. He has brought the case here by writ of error. As the only errors assigned relate to the charge of the court, we here quote the substance of the charge, as follows:

"The statute of this State provides a punishment for any person who shall undertake to medically treat any female person and while so treating her shall represent to such female that it is, or it will be, necessary or beneficial to her health that she have sexual intercourse with a man and shall thereby induce her to have carnal sexual intercourse with any man, or if any man, not being the husband of such female, shall have sexual intercourse with her by reason of such representation, the person or persons so offending shall be—and so forth. And this information, gentlemen of the jury, is drawn under this section of the statute.

"You are the sole judges of the facts. It is for you to determine who is telling the truth and what inferences shall be drawn from the testimony.

"The defendant has taken the stand in his own behalf and you are to give his testimony the same consideration as the testimony of any other witness, except in so far as you may inquire into his motives or any interest he may have in the outcome of the trial.

"The issue, gentlemen of the jury, here is whether the act of intercourse was done under the inducement of the defendant, and if you believe it was done under the inducement of the defendant by reason of offering or holding out to treat the complaining witness medically for bodily ill and that she consented to the act of intercourse under the belief that it was for her health, then, gentlemen of the jury, if you believe that, and believe it beyond a reasonable doubt, it is your duty to convict this defendant.

"If you believe, however, that this complaining witness consented to it, as testified to by defendant, then your duty is to acquit this defendant.

"That is the sole issue, gentlemen of the jury, in this case, as to whether the act of intercourse was induced by the offer of medical treatment or as a process of treatment for the health of the complaining witness, or whether it was done by the consent and knowledge of the complainant and not for her health. That is all there is to this case, gentlemen of the jury; that one issue.

"Now, the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt, and a reasonable doubt is not a vain, possible, imaginary or captious doubt, but a fair doubt founded on reason and common sense, growing out of the evidence or lack of evidence in the case. It is such a doubt that, after a careful review of all the testimony, you cannot say you have an abiding conviction to a moral certainty of the defendant's guilt. If you have, give him the benefit of it and acquit him. If not, you may convict him of the charge in the information."

There were no requests to charge by defendant's counsel. The errors assigned are as follows:

"(1) That the court erred in charging the jury as follows: 'If you believe, however, that this complaining witness consented to it as testified to by defendant, then your duty is to acquit this defendant,' and in failing to instruct said jury that if this testimony of said defendant raised a reasonable doubt in the minds of said jury as to defendant's guilt, he, defendant, should be given the benefit of the doubt and should be acquitted.

"(2) That the court erred in charging said jury as follows: 'It is for you to determine who is telling the truth and what inferences shall be drawn from the testimony,' for the reason that such instruction was too indefinite and uncertain and gave the jury to understand that they might draw inferences and guess at the facts without limit, whereas they should have been confined to such proper inferences as might properly be drawn from facts established as evidence in the case beyond all reasonable doubt.

"(3) That the court erred in charging the jury as follows: 'The defendant has taken the stand in his own behalf and you are to give his testimony the same consideration as the testimony of any other witness, except in so far as you may inquire into his motives or any interest he may have in the outcome of the trial,' for the reason that it establishes a different mode, method and rules for the jury to weigh the testimony of the defendant from other witnesses in the case as to the motives or interest of such witness.

"(4) That the court erred in failing to instruct the jury that the burden of proof was upon the people to establish every element of the offense beyond a reasonable doubt and that such burden remained upon the people throughout the trial, and until the evidence satisfied the jury beyond all reasonable doubt of respondent's guilt."

1. Criticizing the language of the charge here quoted, defendant's counsel says:

"In order for the jury to have been justified in acquitting respondent, it was not necessary that they must believe his testimony in reference to her consenting to the act, but they should have been instructed that if his testimony and claim that the act of intercourse was the result of her free will and desire, and not of any alleged misrepresentation on his part as to her health, created in their minds a reasonable doubt (not an absolute belief) they should acquit respondent."

Counsel cites *People v. White*, 194 Mich. at p. 175, and *People v. Prinz*, 148 Mich. at p. 308, and quotes from the last-cited case the following:

"It is doubtless true that the trial judge should, even though no requests be preferred, cover the general features of the case, define the offense, and indicate what it is essential to prove to establish the offense."

Counsel also quotes from 1 Wharton's Crim. Ev. (10th Ed.), p. 660, the following:

"A reasonable doubt as to any essential element of the crime, or of the proof of any essential fact, must always be resolved in favor of the defendant."

Other authorities are cited, including *People v. Cis-madija*, 167 Mich. at p. 215, where the charge erroneously placed the burden of proof upon defendant, to convince the jury beyond a reasonable doubt that he did not premeditate the crime. We do not think that the part of the charge here complained of is open to the criticism made. This court has repeatedly held that we must take the whole charge together in construing it, and that its correctness cannot be tested by taking particular parts thereof. *People v. Finley*, 38 Mich. 482, 486; *People v. Howard*, 50 Mich. 239, 246; *People v. Brown*, 53 Mich. 531, 536. In the last-cited case, in speaking of the charge, we said:

"We do not think, however, that it is quite fair to select out single passages and deal with them as if they were independent."

Turning to the charge in the instant case, we find that the part of the charge complained of was not misleading or erroneous, in itself. In another part thereof the trial court instructed the jury fully that the defendant was presumed to be innocent until proven guilty beyond a reasonable doubt, and defined such doubt, and concluded as follows:

"It is such a doubt that, after a careful review of all the testimony, you cannot say you have an abiding conviction to a moral certainty of the defendant's guilt."

We cannot conceive that there was any likelihood of the jury being led to a wrong conclusion by the charge concerning the question of reasonable doubt, or burden of proof.

2 and 3. The second and third assignments of error are discussed together by counsel. Of the second counsel says it was certainly too indefinite and uncertain, and placed no limit or bounds upon the jury in drawing inferences as to facts; and it is argued that the jury can only draw proper inferences from proven facts—a proposition with which we agree.

The language of Chief Justice CAMPBELL in *People v. Finley*, 38 Mich. at p. 486, is pertinent here, viz.:

“A jury knows without instruction that it has a right to consider any testimony which has been allowed to go before it, and to draw such inferences as naturally are drawn by each one of the body. When a court calls attention to bits of evidence, or to particular witnesses, more than others, there is some danger that undue prominence will be given to what is so designated. It is at least quite as safe to avoid this practice, unless circumstances appear to require it.”

It is very apparent that the language used by the trial court limited any inference the jury might draw to the facts and testimony presented to them upon the trial. The language used was as follows:

“You are the sole judges of the facts. It is for you to determine who is telling the truth, and what inferences shall be drawn from the testimony.”

We find no error in this part of the charge, and think that the jury could not have been misled by it.

It is urged that the instruction complained of in the third assignment of error was unfair and prejudicial to the defendant, in that it unduly emphasized his interest in the case, and in its outcome; and the following cases are cited: *People v. Willett*, 105 Mich. 110, 115; *People v. McArron*, 121 Mich. 1, 41.

In the *Willett Case* this court approved of an instruction in the following form:

"In the beneficence of our modern statutes, in this State, one on trial for a crime is allowed to testify under oath in his own behalf. His interest in the result of the trial, that would formerly preclude his so testifying, now has not that effect, and it is the duty of the jurors, where this is done, to give his testimony such weight as, in view of all the facts and circumstances shown, it shall appear to them to be entitled to. His interest is to be considered only so far as it affects his credit. His testimony is to be scanned and tested the same as that of other witnesses. If rational, natural, and consistent, it may outweigh the testimony of other witnesses. If inconsistent with established facts, or with his prior statements, you will treat it the same as you would that of any other witness whose testimony is thus defective."

In the *McArron Case* a request to charge was refused, which read as follows:

"The defendant, under our statute, is allowed to testify under oath in his own behalf, and it is the duty of the jurors, where he has done so, to give his testimony such weight as, in view of the facts and circumstances shown, it shall appear to them to be entitled to. His testimony is to be tested the same as that of other witnesses. If rational, natural, and consistent, it may outweigh the testimony of other witnesses."

It was held in that case that the refusal to instruct as requested was error. It will be noted that in the *McArron Case* the question raised was on the refusal of the court to charge as requested; whereas in the instant case the trial court charged the jury upon the question, there being no request to charge. We cannot say that the charge as given by the trial court was erroneous. That a defendant, in a criminal case, has an interest in the outcome of the trial goes without saying. While the charge might well have been more

elaborate upon this proposition, in the absence of any request to charge upon the subject, we do not think there was any reversible error. The charge as given did not establish a different mode, method and rule for the jury to weigh the testimony of the defendant from that of other witnesses in the case. They were told that they should give his testimony the same consideration as the testimony of any other witness, except that they might consider his interest in the outcome of the case.

4. Upon the question of the burden of proof, defendant's counsel says:

"If the instructions as to defendant's rights had been clear and correct, the trial court's failure in respect to the burden of proof might not have been harmful";

But it is urged that under the circumstances of the case it became important that the court should inform the jury that the burden of proof of each element of the offense was upon the people, and each element should be established beyond all reasonable doubt, and that a failure on the part of the people to establish either of the elements, beyond a reasonable doubt, entitled defendant to acquittal. We have already spoken upon the subject of the presumption of innocence. The questions with reference to burden of proof and presumption of innocence are closely allied and have been frequently discussed by this court. *People v. Graney*, 91 Mich. 646.

In *People v. Ostrander*, 110 Mich. 60, it was held that failure to instruct the jury in a criminal case as to the presumption of innocence is not reversible error where the attention of the court was not called to the omission, and the charge as given was explicit and to the effect that the guilt of the accused must be proved beyond a reasonable doubt; and *People v. Graney*, *supra*, and *People v. Smith*, 92 Mich. 10, were cited.

See *People v. Yund*, 163 Mich. 504, and *People v. Rogulski*, 181 Mich. 481, where allusion is made to the duty of counsel to call the court's attention to the subject, by request to charge.

The charge of the court would doubtless have been more elaborate on the question of burden of proof had its attention been called to the subject by counsel. We cannot say that this omission in the charge has in this case resulted in a miscarriage of justice; and, in view of Act No. 89, Pub. Acts 1915 (3 Comp. Laws 1915, § 14565), the case should not be reversed for such failure to more fully charge upon the subject. *People v. Smolkiewicz*, 206 Mich. 1.

Judgment of the recorder's court is therefore affirmed.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

HENDRICKS v. COBB.

1. BROKERS—COMPENSATION, WHEN EARNED.

To entitle a broker to recover for making a loan he was employed to make, but which was not accepted by the principal, it was necessary for him to show that he had produced a person willing, ready, and able to make the loan.

2. SAME—PROOF.

Proof of statements to plaintiff by a lawyer that he had a client ready to make the loan, *held*, insufficient to prove that plaintiff had a person willing, ready, and able to make the loan.

3. SAME—LIABILITY WHERE SEVERAL BROKERS EMPLOYED.

Where several brokers were employed to secure a loan, the employer, provided he remains neutral towards the several brokers, is liable for commissions only to the one who first completes the loan, or if he has not delegated authority to conclude the transaction, to the one who first produces a person able, ready, and willing to make the loan on terms agreeable to the employer, and this without any express contract to that effect.

4. SAME—AUTHORITY TO CLOSE DEAL—LIABILITY FOR COMMISSION.

Where there was some evidence that defendant authorized plaintiff to close the deal for the loan, it was not erroneous for the trial court to express the opinion that, in order to save himself from the danger of being called upon to pay two parties for procuring the loan, defendant should have made such a contract with plaintiff as would have protected defendant, and that at the least he should have informed plaintiff that he was seeking the loan elsewhere and would not be held to pay if he succeeded in getting it before plaintiff did.

Error to Barry; Smith (Clement), J. Submitted November 4, 1919. (Docket No. 77.) Decided December 23, 1919.

Assumpsit in justice's court by Hartley E. Hendricks against Ira Cobb for a broker's commission. There was judgment for plaintiff, and defendant appealed to the circuit court. Judgment for plaintiff. Defendant brings error. Reversed.

N. A. Cobb and W. W. Potter, for appellant.

Thomas Sullivan and Milton F. Jordan, for appellee.

BIRD, C. J. Defendant was the owner of a large farm in Barry county upon which he desired to negotiate a mortgage loan of \$5,100. He applied to plaintiff to negotiate it for him. The agreed consideration for obtaining the loan appears to have been \$50, and in addition thereto any expense plaintiff might incur in taking prospective lenders to view the premises. Plaintiff took two persons to view the farm, but both re-

fused to make the loan. He then had some talk with one Gleason, a lawyer of Grand Rapids, who had a client with funds to loan on mortgage security. Gleason's representative was taken to the farm and made a favorable report, whereupon Gleason advised plaintiff that in the event his client took the loan he would have to charge \$50 for his services in examining the abstract. Plaintiff called the defendant by telephone and advised him of the talk with Gleason. Defendant replied that he would pay the additional fee and advised plaintiff "to hurry it up as he was very anxious to secure it." The following day Gleason's client concluded to take the loan if the abstract showed defendant had a clear title. Plaintiff called defendant on the telephone again and communicated this information to him and requested him to come to Grand Rapids and bring his abstract. Defendant replied that the abstract was in New York, that it would be returned within a day or two, and he would come over to Grand Rapids with it. A few days later defendant informed plaintiff that the loan had been taken in New York, and that he would not need the Gleason loan. The matter being concluded plaintiff demanded his fee, insisting that he had earned his commission. The defendant did not agree with him and this suit was commenced to enforce the payment thereof. At the conclusion of plaintiff's case defendant insisted that plaintiff had not shown facts which entitled him to recover. In support of this contention counsel insisted that it was the duty of plaintiff to show affirmatively that he produced a person who was willing, ready and able to take the loan. It was argued that plaintiff had not discharged this burden and that no competent proof was offered to show that such a person was produced.

1. It is, undoubtedly, true, as argued, that to entitle plaintiff to recover it was necessary for him to

show that he had produced a person willing, ready and able to make the loan. *Wright v. Beach*, 82 Mich. 469; *West v. Hudson*, 171 Mich. 669; *Crawford v. Cicotte*, 186 Mich. 272. An examination of the plaintiff's testimony discloses that his proofs were defective in this respect. Upon cross-examination the plaintiff admitted that he did not know the party who was to furnish the loan and did not know whether she was worth "fifty cents or five thousand dollars." In fact, he admitted he knew nothing about her willingness, readiness or ability to make the loan, save what had been told him by Gleason. Neither Gleason nor the party who was to make the loan was produced. With the proofs in this state, we are of the opinion that plaintiff was not entitled to recover.

2. In view of the fact that a retrial must be had, another question over which counsel are at variance should be noticed. The trial court expressed the opinion that:

"It must be admitted that it is a seeming hardship that defendant should pay two parties for procuring this loan. It is my judgment, however, that in order to save himself from the danger of being called upon to do so, he should have made such a contract with plaintiff as would have protected him, and that at the very least he should have informed him that he was seeking the loan elsewhere, and would not be held to pay the plaintiff should he succeed in getting it before the plaintiff did."

Defendant's counsel insist that this is an erroneous view of the law because plaintiff did not have an exclusive agency and because plaintiff did know that others were working on the loan, and authorities are cited to the effect that where several brokers act independently and with knowledge of the fact that one who first completes the sale or obtains the loan is entitled to the commission. Among these citations is 4 R. C. L. p. 335, which states the rule to be that:

"Where the same property is placed for sale with two or more brokers, the owner, provided he remains neutral towards the several brokers, is liable for commissions only to the one who first completes the sale, or if the owner has not delegated authority to conclude the transaction, to the one who first produces a customer, able, ready and willing to purchase the property on terms agreeable to the owner; and this is true without any express contract to that effect." Citing authorities.

Under this rule, if plaintiff first obtained the loan, then he was entitled to his commission. The court having found, as a matter of fact, that plaintiff did first obtain it, the judgment in his behalf would be amply supported by conclusions of law and fact. The remaining conclusion of law in this connection that if defendant desired to save himself from the danger of being called upon to pay a second time he should have protected himself by an agreement with the defendant to that effect, is objectionable unless defendant authorized him to close the deal with Gleason. There was some proof to this effect, and, therefore, we cannot hold that this conclusion of law was unwarranted.

The judgment must be reversed and a new trial ordered, with costs of both courts to the defendant.

SHARPE, MOORE, STEERE, BROOKE, FELLOWS, STONE,
and **KUHN, JJ.**, concurred.

BAXTER v. OAKLAND CIRCUIT JUDGE.**1. COSTS—TAXING TERM FEE ON POSTPONEMENT.**

Under 3 Comp. Laws 1915, § 13685, requiring a term fee to be taxed for every term at which a cause is regularly on the calendar, and not reached, or is postponed, if the case is not reached on the call, the term fee is taxable, and if reached, but not tried, by reason of a continuance, a stipulation of the parties, or a lack of time, it is postponed within the meaning of the statute, and the fee is taxable, except where the taxing party has been allowed a continuance fee.

2. SAME—STIPULATION TO POSTPONE—WHICH PARTY SUGGESTED POSTPONEMENT IMMATERIAL.

Under said statute, a term fee is taxed when a case is reached and postponed, although the postponement is at the request of the attorney for the party who finally prevails; for a case is just as clearly postponed if a stipulation is filed the moment the case is reached as it would have been had the stipulation been filed on the first day of the term, and the question at whose suggestion it was postponed can have no influence on the interpretation of the statute.

3. SAME—PURPOSE.

The provision for the taxation of a term fee in said statute was created as a service fee for noticing the cause for trial, preparing and delivering a note of issue to the clerk, and afterwards giving the usual attention to cases on the calendar.

Mandamus by Arthur L. Baxter to compel Kleber P. Rockwell, circuit judge of Oakland county, to set aside an order refusing to tax certain term fees. Submitted December 13, 1919. (Calendar No. 28,692.) Writ granted December 23, 1919.

B. F. Reed, for plaintiff.

Andrew L. Moore, for defendant.

BIRD, C. J. This is an application for a writ of mandamus to compel defendant to set aside his order refusing to tax certain term fees, in the case of *Baxter v. Stout*, in the Oakland circuit court, and to tax the same in accordance with plaintiff's contention. It appears that the case was on the calendar for the September and November terms of 1917, and for the January, March and June terms of 1918, but for various reasons was not disposed of. The statute in question provides that:

"There shall be allowed to the prevailing parties costs in addition to the fees of officers, * * * for every term at which a cause is regularly on the calendar and not reached, or is postponed, excluding that at which it is tried, five dollars: *Provided*, That no such term fees shall be allowed to any party for any term at which he was allowed a continuance fee."
* * * 3 Comp. Laws 1915, § 13685.

In commenting on this provision counsel for defendant has this to say:

"The question that is squarely raised in this case is: What does the phrase 'not reached or is postponed' mean?

"Counsel for relator contends that if the case was reached and then was postponed, that he would be entitled to a term fee. The language of the statute is not free from ambiguity. It is clear that a case might be postponed by stipulation that was not actually reached in the call of the docket, and that question has been settled in the case of *Martin v. Wayne Circuit Judge*, 111 Mich. 71; but, suppose a case is reached and is postponed, and suppose the postponement is at the request of the attorney for the party who finally prevails—Does the statute mean that in such a case there shall be a term fee taxed?"

Under this statute, if the case is not reached on the call the term fee is taxable. If the case is reached on the call but not tried, by reason of a continuance, a stipulation of the parties, or a lack of time, it is post-

poned within the meaning of the statute, and the term fee is taxable, save in one particular, where the taxing party has been allowed a continuance fee. But counsel says, Suppose a case is reached and is postponed? The case is just as clearly postponed if a stipulation is filed the moment the case is reached as it would have been had the stipulation been filed on the first day of term, and the question on whose suggestion it was postponed can have no influence on the interpretation of the statute. That question involves the rule of reciprocal courtesies which the statute does not appear to have recognized.

The provision for a term fee in the foregoing statute was undoubtedly created as a service fee for noticing the cause for trial, preparing and delivering a note of issue to the clerk, and afterwards giving the case such attention as lawyers are accustomed to give their cases which are on the calendar. This service is usually performed before it is determined whether the case will be reached and usually before any postponement is requested or granted.

Our conclusion is that the court should have taxed the five term fees. Should any occasion arise for having the writ issue after the trial court's attention is called to this opinion, it may issue. Plaintiff will recover his costs to be taxed against the defendant Stout.

SHARPE, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

BRIGGS v. TOWNSHIP OF RONALD.

ELECTION OF REMEDIES—PAUPERS—CLAIM FOR CARE.

Although plaintiff was authorized by the supervisor of the township to care for an aged and infirm man, who was without relatives to care for him, until his death, where she presented her claim for same against the estate of deceased, and the commissioners on claims allowed it in part, presumably determining that the amount allowed was all she was entitled to, she elected her remedy, and could not thereafter maintain an action against the township for the balance of her claim.

Error to Ionia; Davis (Frank D. M.), J. Submitted October 21, 1919. (Docket No. 96.) Decided December 31, 1919.

Assumpsit by Minnie Briggs against the township of Ronald for the care of an alleged indigent person. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Hawley & Eldred, for appellant.

F. C. Miller, for appellee.

KUHN, J. This litigation arises as a result of a claim for the cost of maintenance, care and nursing of an old gentleman named Robert Kettleton during his last illness. On the 8th of December, 1915, Mr. Kettleton was a resident of the defendant township and, so far as this record shows, was without relatives or friends who were in any way liable for his care or support. On that day he was taken to the hotel owned and operated by the plaintiff and her husband, and was accepted by them as a guest. He was suffering from a complication of diseases and was unable to take care of himself physically. On the morn-

ing following his reception by the plaintiff, the plaintiff's husband called the supervisor of the township by telephone and advised him as to the physical condition of Kettleton and told him to come and look after him—that they could not keep him at the hotel, and that he must be moved. On the following day, the supervisor investigated the physical condition of Kettleton, consulting with a doctor, and advised the plaintiff and her husband that Kettleton had but a few days to live, according to the doctor's statement, and that they had better keep him at the hotel for that short time. The supervisor promised to call again in a few days, which he failed to do. No objection was made to this arrangement by the plaintiff and no further claim for compensation and no insistence for any further claim as to compensation was made against the defendant township during the lifetime of Kettleton. Kettleton died on January 11, 1916.

At the time that Kettleton went to the hotel of the plaintiff he was the owner of a parcel of land in the defendant township, which later was sold for \$700 and was incumbered to the amount of \$127. He also had about \$40 on his person and \$20 in the bank. He had no one dependent upon him for support. After the death of Mr. Kettleton, the plaintiff and her husband made arrangements for the funeral, which was held at the hotel. The total claim of the plaintiff and her husband for taking care of Kettleton and for expenditures made by them in his behalf amounted to \$424, of which \$15 was paid by the deceased, leaving the claim balance due the amount of \$409. The plaintiff's husband assigned his interest in the claim to the plaintiff and soon after making this assignment Mr. Briggs died. The plaintiff filed her claim before the commissioners on claims who were appointed by the probate court in the matter of the estate of Mr. Kettleton and after a full hearing before them, the claim

was allowed in the sum of \$248. No appeal was taken from the allowance of this amount.

This suit is brought to recover the balance of the amount claimed to be due the plaintiff beyond the sum allowed to her by the commissioners. The case was tried before a jury and at the conclusion of the opening statement of the plaintiff's attorney, on a motion of the attorney for the defendant, the court directed a verdict for the reason that the deceased, Robert Kettleton, being possessed of the amount of property above indicated, was not a "poor person" within the meaning of the statutes. The court further stated that even if the case might proceed upon the theory of the plaintiff that the supervisor authorized the contract, or that the township should be held upon an implied contract, that, nevertheless, the plaintiff chose to bring this case before the commissioners appointed by the probate court, and thus elected her remedy.

While the first question involved is, indeed, a very interesting one, *i. e.*, whether or not, under the circumstances in this case, it was not a question of fact for the jury to determine whether Mr. Kettleton was, at the time of his death, a "poor person" within the meaning of the statutes, we are of the opinion that the circuit court was clearly right in saying that in this case the plaintiff has elected her remedy and has had her day in court and consequently had no standing in this proceeding. The claim was filed before the commissioners for \$409. It was allowed in the sum of \$248. As the learned trial judge said, it must be presumed that the commissioners allowed all that they thought ought to be allowed to the claimant in that case—the plaintiff in this case. Instead of making a claim against the township at that time, she elected to proceed against the estate of the deceased and she received all that she was allowed by the tribunal that heard her claim and had full authority to ad-

judicate her rights in the matter. Another situation would have been presented if she had not received all that she was allowed by the commissioners and had brought suit for a claimed balance which could not be collected out of the estate.

We see no escape from the conclusion that the plaintiff has elected her remedy. She took the amount allowed to her by the commissioners on claims and was apparently satisfied therewith, because no appeal was taken from that allowance. See *Kraft v. Kraft*, 102 Mich. 439.

The judgment must be affirmed.

BIRD, C. J., and SHARPE, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

FOLGER v. ADDISON APARTMENT CO.

APPEAL AND ERROR—IMMATERIAL ISSUE—HARMLESS ERROR.

In an action for the breach of an oral contract of employment as hotel manager, where the issue, *i. e.*, the terms of the contract, and whether defendant had the right to terminate same on 30 days' notice, was properly submitted to the jury, and decided by them in plaintiff's favor, the submission also of the question as to whether a previous contract made with plaintiff by defendant's manager was binding upon defendant, although immaterial, *held*, not prejudicial to defendant.

Error to Wayne; Sharpe (Nelson), J., presiding. Submitted October 21, 1919. (Docket No. 102.) Decided January 5, 1920.

Assumpsit by Alonzo T. Folger against the Addison Apartment Company for breach of a contract of employment. Judgment for plaintiff. Defendant brings error. Affirmed.

Trowbridge & Lewis (E. R. Milburn, of counsel), for appellants.

Percy W. Grose, for appellee.

BIRD, J. The board of defendant company, by resolution, appointed F. W. Bergman managing director of the Addison apartments, in the city of Detroit, with power to employ a resident or assistant manager thereof, and set aside \$6,000 to cover his yearly compensation, and the compensation of the assistant. Bergman, in the latter part of December, 1915, employed plaintiff as his assistant at \$300 a month, with board and room for himself and family. The service was to

begin on January 1, 1916, and continue for one year, subject to certain contingencies, which will later appear. This contract with plaintiff is evidenced by several letters which passed between him and Bergman. The contract contains the following provision:

"We wish to confirm our conversation recently during which we offered you the management of the Addison hotel at three hundred dollars per month, and rooms and board for yourself and family, to commence January 1, 1916. After the expiration of six months, providing everything is satisfactory and business has developed under your management to warrant it, a substantial increase in salary will be arranged for; by mutual consent, this arrangement may be terminated on thirty days' notice, otherwise it is a twelve months' agreement of service and employment."

Plaintiff worked under this agreement less than three weeks when Bergman resigned as manager of the hotel, and also as director of the company. Plaintiff was then called before the board, and after some talk he was offered Bergman's place as manager and director. He was asked about compensation and it is his claim that he replied that he would be willing to serve in the new position on the same terms as he was then serving as assistant. This agreement resting entirely in parol, and being desirous of having it confirmed by some writing, defendant wrote plaintiff on January 17, 1916, as follows:

"Pursuant to our conversation as confirmed by our board of directors, I am writing to put the same in such form that there shall be no misunderstanding.

"The Addison Apartment Company employs you to act as its general manager, commencing with January 1st, at a salary of three hundred dollars per month, to be paid monthly or semi-monthly, as may be convenient. At the end of six months the work shall be reviewed by yourself and the board of directors, and if agreeable to both parties, a further arrangement can be made. In the event that either party shall wish

to terminate the arrangement, in the meantime, he shall give thirty days' notice.

"You are to have full charge of the management of the hotel, acting and co-operating with the officers and board of directors of the company.

"If this arrangement is not satisfactory to you, we will be pleased to have you advise."

To this, plaintiff replied:

"In connection with your letter of the 17th in which our understanding to continue service under agreed terms of employment previously arranged is referred to, I note there is a difference in your letter confirming our arrangement.

"I refer to that feature which includes apartments and board for myself and family, which is always understood in taking charge of a house, and in order to make it clear I quote from your managing director's letter of December 11, 1915, the conditions under which I accepted the management, and which conditions it is understood continue.

"We wish to confirm our conversation recently during which we offered you the management of the Addison hotel at three hundred dollars per month, and rooms and board for yourself and family, to commence January 1, 1916. After the expiration of six months, providing everything is satisfactory, and business has developed under your management to warrant it, a substantial increase in salary will be arranged for; by mutual consent this arrangement may be terminated on thirty days' notice, otherwise it is a twelve months' agreement of service and employment.'"

In answer to this, defendant wrote:

"Answering your communication of January 18, 1916, I have been instructed by the board of directors to say that the letter of myself, dated January 17, 1916, may be, and is hereby modified to include rooms and board for yourself and family, in addition to the monthly compensation provided for."

On February 7th plaintiff claims he sent the fol-

lowing letter to defendant but defendant denies that it was ever received:

"Your letter of February 7th, referring to mine of January 18th, which gives clearly the terms of my engagement with the Addison Apartment Company, does not give me your promised confirmation of my understanding. The board of directors in meeting January 11th agreed that I should continue under the same terms I had accepted from your retiring managing director, and it is this which should be confirmed, if you think a confirmation necessary.

"Your two letters, the one a modification of the other, does not do this, but would apparently undo the arrangement and place a new one on a monthly basis of employment. No reputable hotel man would care to take a management in which he could not see further than thirty days.

"I would very much like to confer with the board of directors next meeting night, February 14th, and know just what it is I am supposed to understand in regard to my engagement here."

Plaintiff went on acting as manager of the hotel and director of the company until August 31, 1916, when he received a letter from defendant putting an end to his employment on October 1st. Accordingly, on this date, he left the hotel with his family, and soon after commenced this suit to recover damages for not being permitted to finish his term. The matter was submitted to a jury and they returned a verdict in plaintiff's favor of \$1,400.

Plaintiff contends he was working under the terms of the agreement he made with Bergman, and that, under that agreement, his dismissal before the end of his term was wrongful.

Defendant argues that it had a right to terminate the agreement either under its own agreement with plaintiff or under the Bergman contract, by giving thirty days' notice, and that the trial court was in error in refusing to direct a verdict for defendant,

and also in refusing to charge the jury that it had a right to terminate either contract.

It is conceded that plaintiff made a contract with Bergman, that its terms were certain, and that he began his work as assistant manager thereunder. While so engaged, Bergman resigned his connection with defendant. The board then called plaintiff in and offered the place to him. They discussed the terms under which he should become the manager, and evidently at the time reached an agreement. From this point the parties are not in accord as to the terms of the agreement. Plaintiff says he offered to assume the new position on the same terms as the old, and that under that agreement his dismissal was wrongful. Defendant, on the other hand, contends that it had a right to terminate the agreement under either contract by giving 30 days' notice, and it points to its letters addressed to plaintiff subsequent to the making of the agreement as evidence that its version is right. The fact must not be overlooked that the latter contract with plaintiff was an oral one. An attempt was subsequently made by both parties to come to a written understanding of what the agreement was, but they did not succeed in this, as will be shown by their letters. It, therefore, became a question of fact which version was the correct one.

The real question in controversy was not whether plaintiff was working under the first or second contract, but what the terms of the second contract were. Plaintiff admitted he was working under the new arrangement which he had with the board, but he insists that the terms of that arrangement were the same as those he had with Bergman. If this were true, it would not matter whether the Bergman contract was binding on the defendant or not. Even if it be conceded that the Bergman contract was invalid, it had terms, and plaintiff says those terms were the

terms of his agreement with the board. While we think the question submitted to the jury as to whether the Bergman contract was valid and binding on the corporation was immaterial, still the trial court put the crucial question up to the jury to determine which version was right. If any error was made by submitting this immaterial question, it was more prejudicial to plaintiff than to defendant. The submission of the case to the jury was as favorable to defendant as it had a right to demand. The jury having accepted plaintiff's version, the parties are thereby concluded.

We find no reversible error in the remaining assignments. The judgment is affirmed.

MOORE, C. J., and STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred. SHARPE, J., did not sit.

Justice KUHN took no part in this decision.

HORNER *v.* TOWNSEND.

BILLS AND NOTES—CHECKS—FAILURE OF CONSIDERATION—DIRECTED VERDICT.

In an action on a check given as part of the purchase price of a farm, where plaintiff's testimony failed to make out a case, there being a failure of consideration, a verdict for defendant should have been directed.

Error to Eaton; Smith (Clement), J. Submitted October 17, 1919. (Docket No. 80.) Decided January 5, 1920.

Assumpsit by Charles S. Horner against Lemuel C. Townsend for the amount of a check. Judgment for plaintiff on a directed verdict. Defendant brings error. Reversed.

Richard Price, for appellant.

E. R. Boyles, for appellee.

MOORE, C. J. November 21, 1916, the plaintiff commenced this suit, filing a declaration on the common counts in assumpsit, and filed a bill of particulars as follows:

"To amount due and owing on a certain check, bearing date January 1, 1911, signed by the defendant and made payable to the order of the plaintiff for the sum of two hundred dollars, with interest thereon from date thereof; also protest fees on said check, amounting to the sum of one dollar and fifty-four cents, and that said check will be given in evidence upon the trial of said cause."

Defendant pleaded the general issue and gave notice that he would show under such plea:

"That the check upon which plaintiff's suit is based is without consideration and void; that it was given as part of the purchase price for real estate which said plaintiff contracted to sell to said defendant; that said plaintiff knew that defendant was buying the property for the purpose of sale, and agreed to execute a deed so that transfer could be made to the prospective purchaser of it, but that said plaintiff failed to perform his agreement and defendant lost the sale of the property, and said plaintiff subsequently sold the property to another. Whereby, defendant lost the profits which he would have made upon the purchase and sale of said property and was greatly damaged and claims judgment in the sum of \$1,000 in his favor."

On the trial of the case the check was introduced in evidence. After the testimony was all in the trial court directed a verdict for the full amount of the

check in favor of the plaintiff. The case is brought here by writ of error.

The record shows defendant had negotiations with plaintiff for the purchase of a farm. After they had agreed upon the terms defendant was referred by the plaintiff to Mr. Hendee, an attorney, to draw the papers. A land contract was drawn October 3, 1910, which is in the record in which it is said:

"2. In consideration of the foregoing covenants and agreements on the part of the party of the first part to be done and performed as hereinbefore provided, the party of the second part agrees to purchase and does hereby purchase of said first party the lands and premises above described, and agrees to pay therefor to the said party of the first part, his legal representatives and assigns, the sum of five thousand dollars, in manner following, to wit: Two hundred dollars cash upon the execution and delivery of this duplicate agreement; twenty-three hundred dollars or more on or before the 1st day of January, A. D. 1911, at which time and upon the payment of the said sum of twenty-three hundred dollars by second party, first party agrees to execute and deliver to said second party or to such person or persons as second party may designate, a good and sufficient warranty deed of conveyance of said lands and premises above described, and upon the execution and delivery of said deed, second party agrees to execute and deliver to said first party, or cause to be executed and delivered to said first party, a mortgage back upon said lands and premises for the balance of the purchase money remaining unpaid on said 1st day of January, A. D. 1911." * * *

Instead of paying \$200 in cash when the contract was signed it is inferable from the record that the \$200-check which is in suit was given.

The defendant sought to show in substance when the contract was drawn it was understood plaintiff was going south soon, and that the attorney stated that the plaintiff would make a deed and would leave it with the attorney for delivery to the defendant on

his performing his part and that later he took Mr. Smith with the money which was required to be paid, and asked for the deed, and that the attorney informed him the deed had not been left with him. This testimony was excluded because Mr. Hendee at the time of the trial was dead, and, unfortunately for the defendant, Mr. Smith was also dead. The defendant gave testimony to the effect that for the purpose of making the payments called for in the contract, he went to the bank in plaintiff's town and to the office of the attorney who drew the contract, and to the place of business of the plaintiff, and was unable to find him, and was told that the plaintiff was in the south. He testified that he was prepared to make the payments and that he was unable to secure the deed. Much of this testimony was stricken out as being within the knowledge of Mr. Hendee. Complaint is made of this ruling of the court.

For the present we may proceed directly to the testimony of the plaintiff. We quote from it as follows:

"I said I had some negotiations with Mr. Townsend relative to the purchase of a farm which resulted in a contract. That contract is here. * * *

"I don't remember seeing Mr. Townsend the day that contract, Exhibit 1, was signed. The business was done through Mr. Hendee entirely. Mr. Townsend and I probably did not meet each other on that day.

"Q. What did you give to Mr. Townsend for this check?

"A. Gave him a contract.

"Q. Gave him a contract. Was that worth \$200 alone?

"A. I don't know, I am sure.

"Q. That contract is dated October 3, 1910, isn't it?

"A. I don't remember the date.

"Q. That is the date of it. Your check is dated January 1, 1911. How do you explain that?

"A. I have not any explanation for it.

"Q. You can't explain it. What do you mean by saying you gave Mr. Townsend a contract as a consideration for the \$200-check?

"A. Well, it bought the farm.

"Q. You were to give him a farm?

"A. Yes, sir.

"Q. That was the consideration for your two hundred dollar-check?

"A. Yes, sir. I never gave him the farm. I have since disposed of the farm. It has been sold.

"Q. And you have disposed of it for more than what you sold it to Mr. Townsend for?

"A. I think so.

"Q. You went away somewhere after the contract was signed in October, 1910; where did you go, west or south, or where did you go?

"A. I don't remember; I think it was south.

"Q. And you agreed before you went away that you would leave the deed for that farm with Mr. Hendee so that if Mr. Townsend had an opportunity to dispose of it the deed would be there for that purpose?

"A. I don't remember agreeing to leave it with Mr. Hendee, no.

"Q. Whom did you agree to leave it with?

"A. It was to be left with the Michigan State Bank. I think it was left there. I am quite sure about it. I think Mr. Hendee knew about it.

"Q. Mr. Hendee was looking after your business?

"A. Yes, sir. I learned when I got home that Mr. Townsend didn't take the farm.

"Q. The reason he didn't take it was because there was no deed made, so that he could give no deed of the farm, and therefore could not make the transaction go through?

"A. I think the deed was given.

"Q. Why didn't Mr. Hendee know about it?

"A. I don't know but what he did know about it.

"Q. Mr. Hendee was looking after that business for you?

"A. Partly, yes, sir.

"Q. If Mr. Hendee didn't know about that deed and couldn't give it to Mr. Townsend you might as well take it as to leave it somewhere else, mightn't you, isn't that true?

"A. Why, yes. I never offered the deed to Mr. Townsend.

"Q. You didn't leave it with Mr. Hendee who was looking after the business for you?

"A. I wouldn't say whether it was left with Mr. Hendee or at the bank."

He later modified his statement about the amount he received on the second sale of the farm.

The recollection of Mr. Horner about the transaction is very hazy. The inference from his testimony, however, is irresistible that instead of a cash payment of \$200 being made, the check was given instead; that after the contract was made he went away from home without making provision for the giving and delivery of a deed, and bringing home to the knowledge of the defendant where the deed might be obtained. He never tendered a deed and it is not clearly established from his testimony that one was ever drawn.

We think the testimony of the plaintiff shows a failure of consideration for the check. The long delay in bringing suit may or may not be significant. We think upon plaintiff's own showing he failed to make a case, and that a verdict should have been directed in favor of the defendant.

The judgment is reversed, with costs to the defendant, and a new trial ordered.

STEERE, BROOKE, FELLOWS, STONE, BIRD, and SHARPE, JJ., concurred.

Justice KUHN took no part in this decision.

TRUITT v. CITY OF BATTLE CREEK.

1. DEEDS—EFFECT OF LIFE ESTATE IMMATERIAL—REHEARING.

The determination of the question of the effect of the giving of a certain life estate, being unnecessary to a decision of the case, what was said in the former opinion thereon is withdrawn on rehearing.

2. SAME—GIFTS—NEED NOT BE ACCEPTED.

Since no one can be compelled to accept, by gift, title to land, where one does not accept title attempted to be given him, but renounces it, he may buy the premises as any other stranger to the title may do.

3. SAME—PRESUMPTION OF ACCEPTANCE OF GIFT REBUTTABLE.

The presumption that plaintiff accepted a gift deed of land may be rebutted by proof.

4. SAME—GIFT—ACCEPTANCE—EVIDENCE—SUFFICIENCY.

Evidence held, conclusive that plaintiff did not accept a gift deed of land, but renounced it.

5. COSTS—ALLOWANCE BY TRIAL JUDGE—GUARDIAN AD LITEM.

No costs will be allowed against appellant on affirmance, he being a guardian *ad litem* for unknown heirs appointed by the court below, and his compensation and expenses being determined by the trial judge.

Appeal from Calhoun; North (Walter H.), J. Submitted February 4, 1919. (Docket No. 74.) Decided April 3, 1919. Resubmitted October 7, 1919. Former opinion modified January 5, 1920.

Bill by Melbourne E. Truitt and another against the city of Battle Creek and Samuel A. Howes, guardian *ad litem*, to remove a cloud upon title to land. From a decree for plaintiffs, defendant Howes appeals. Affirmed.

Bernard J. Onen, for plaintiffs.

Charles F. McKenzie, for appellant.

FELLOWS, J. The original opinion in this case will be found at page 180 of volume 205 of the Reports of this court. A reference to that opinion will disclose the facts sufficiently except as it may be proper in the course of this opinion to refer to other facts necessary to a full understanding of the case as it will be disposed of on this rehearing. We granted a rehearing on the application of plaintiffs based on the claim that we had reached a wrong conclusion as to the effect to be given to the life estate to Oliver Beauregard and wife, and the further claim that we had misapprehended the concession of plaintiffs' counsel and misconceived his claim as to the effect to be given the first deed from plaintiff's mother to him under the facts disclosed by this record.

The case was originally submitted on briefs, but upon rehearing it was fully argued and further exhaustive briefs have been filed. Numerous authorities have been cited to us, all of which have been examined with care. In view of the claim of misapprehension of plaintiff's contention and those of his counsel, we have again fully considered the record and the original briefs and will now proceed to state our conclusions.

The conclusion we have reached makes it unnecessary to determine the effect of the life estate given to Oliver Beauregard and wife Thersil. The determination of that question being unnecessary, what was said in the original opinion on that subject may be considered withdrawn, and the case will be disposed of on another theory.

It is well understood that a life tenant may not cut off the remainder man and secure the fee by acquiring incumbrances he is legally obligated to pay; nor may he, to the exclusion of the remainder man who is willing to contribute, acquire incumbrances which it is necessary to acquire in order to prevent a forfeiture

of his estate. Counsel for plaintiffs conceded, and concedes, the correctness of these rules; but he insists that they do not apply to the instant case and that we misconceived the extent to which his concession went. It was alleged in the bill of complaint that the original deed to plaintiff from his mother was a "pretended" one, and it was also stated in the original brief that plaintiff claimed title under his deed from Mr. Onen and the later deed from his mother. It was also claimed that the original deed from her was void, a mere nullity. But the effect of this claim was not sufficiently followed up or sufficiently explained to make its significance apparent.

Manifestly no one can be compelled against his will, save only in the case of descent, to accept title to real estate, be that title good or bad; and where one does not accept title attempted to be given him but renounces it, he is not prohibited from buying the premises or incumbrances upon them, or from dealing with them as any other stranger to the title may do. Mr. Onen not only purchased the premises at the foreclosure sale but he also purchased the life estate of Mr. Beauregard who was then alive and who lived several years thereafter, paying him \$800 therefor. The plaintiff did not purchase from Mr. Onen until something like a year after Mr. Onen's purchase. Mr. Onen was not acting as attorney or agent for plaintiffs; he sold for what he had in the premises and there is nothing to indicate that the consideration was not adequate. The purchase price was something over \$3,100; he had agreed to let Mr. Truitt, who was his neighbor and friend, have the premises at what he had in them. Therefore, when plaintiff entered possession he did so, not by virtue of the original deed from his mother, but by virtue of his grandfather's life estate transferred to Mr. Onen and by Mr. Onen to him, and by virtue of the title acquired on foreclosure,

likewise transferred by Mr. Onen to him. He has occupied the premises for over nine years under this claim of title and has, and does, insist that the original deed from his mother was, and is, a nullity. After his grandfather's death he procured a quitclaim deed from his mother. We do not perceive that she had title to convey, but it is quite persuasive that he had not accepted the first deed, and is corroborative of the claim which he now makes. Upon this question, it is unimportant whether plaintiff's claim that the first deed is a nullity is, or is not, well founded; the important fact to be considered is that he claimed it was a nullity, renounced it and made no claim under it. But it may be said that he executed a mortgage to one Harbeck. This mortgage was to Harbeck as trustee for Louise L. Truitt, and others, and was apparently executed for her benefit rather than for plaintiff's. The execution of this mortgage is the only evidence on this record tending to show acceptance of the title conveyed under the first deed. Under the circumstances its probative force is materially minimized. There is a presumption that plaintiff did accept this deed, but it is a presumption that may be rebutted by proof. We feel justified upon this record in concluding that plaintiff did not accept the imperfect title his mother sought to convey to him by the first deed, and that he has claimed, and does claim, that when he purchased from Mr. Onen he was a stranger to the record and could deal with the premises as could any other stranger to the record. The law upon this branch of the case is fully discussed in the exhaustive opinion of Mr. Justice HOOKER in *De-freese v. Lake*, 109 Mich. 415 (32 L. R. A. 744, 63 Am. St. Rep. 584), and we need not repeat or attempt to duplicate such discussion here.

From what has been said, it follows that the decree of the court below will be affirmed. The appellant

is the guardian *ad litem* appointed by the court. No costs will be allowed against him. His compensation and expenses are matters to be determined by the trial judge.

MOORE, C. J., and STEERE, BROOKE, STONE, BIRD, and SHARPE, JJ., concurred.

Justice KUHN took no part in this decision.

HARDY v. PERE MARQUETTE RAILWAY CO.

RAILROADS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—CROSSING ACCIDENT.

In an action against a railroad company for damages to plaintiff's auto truck, received in collision with defendant's engine upon a highway crossing, where the evidence shows that plaintiff with his chauffeur drove at the regular rate of speed upon the crossing, which was known by them to be a dangerous one, without stopping to look and listen, he was guilty of contributory negligence, barring recovery.

Error to Bay; Houghton (Samuel G.), J. Submitted October 23, 1919. (Docket No. 49.) Decided January 5, 1920.

Case by Herman A. Hardy against the Pere Marquette Railway Company for damages to an automobile truck by collision. Judgment for plaintiff. Defendant brings error. Reversed, and no new trial ordered.

The question of duty of driver of automobile as to stopping, looking and listening before attempting to cross railroad track, see note in 46 L. R. A. (N. S.) 702.

Shields, Merriam & Sleeper and William R. Seaton (James E. Duffy and Russell H. Neilson, of counsel), for appellant.

Collins, Thompson, Otto & McGinnis (Charles W. Hitchcock, of counsel), for appellee.

STEERE, J. Plaintiff recovered a verdict and judgment in the circuit court of Bay county in the sum of \$1,000, for damages done his automobile truck on August 16, 1917, in a collision between it and a freight train of defendant's at a place called Gilman's crossing, located between the villages of Farwell and Clare in Grant township, Clare county.

Plaintiff is a piano and music dealer of Bay City and was accustomed to make weekly business trips by automobile through different sections of neighboring counties. On the occasion in question he was on his way from the village of Farwell to the village of Clare, a distance of about 6 miles, going southeasterly along the main traveled highway between the two places which crossed defendant's railroad track about $1\frac{1}{2}$ miles southeast of Farwell. He was accompanied by a piano tuner named Hobby who was driving the auto truck. Plaintiff was familiar with the road, having known it for 15 years and traveled it many times. Hobby had driven over it in the opposite direction the previous day. The general direction of the highway between the two places is northwesterly and southeasterly, approaching the railroad track from the northwest at an angle of about 45 degrees. It is called a sandy road for most of the distance from Farwell to the railroad crossing and that section of the country is described by plaintiff as quite hilly.

Some 30 or 40 rods to the northwest of the crossing is a small hill over which the highway passes. From this the railroad is visible both at the crossing and for a considerable distance in each direction. The high-

way slopes down the hill for some 20 rods or more to a small bridge over the Tobacco river and from the bridge slopes upward for some 8 to 10 rods to the railroad crossing which is estimated by plaintiff as 3 feet and by Hobby as 6 or 7 feet higher than the bridge. They both testified that as they approached the crossing they listened and looked in both directions for a train, but discovered none, and as they neared the crossing Hobby fed more gasoline into the car and put his foot on the accelerator to carry them up the grade and over the crossing. The automobile is described by plaintiff as a Dodge touring car made into a truck for the piano business, that it was a "fairly high power car" with three speeds—high, medium and low—"usually driven in the high gear," and of the others said, "second gear is when you get into a pretty tough place, to get through you will throw into second, it gives you more power in second than in high, and if you have a still harder road to travel you put it into low; when you get your engine almost exhausted on high we switch it into second, that gives us more power to shoot through." They had no piano or other load in the truck except themselves, plaintiff's grip, some piano player rolls and their appliances for moving pianos, which "stuff" plaintiff says "was just loose in the back part" of the van, and he had no difficulty that day in getting up the grade from the bridge to the crossing on high gear. He described their approach to it as follows:

"From the top of the hill we didn't stop any place until we got hit. We didn't change the gears at all, did not go from high into intermediate or low. This sand did impede our speed on high gear, but we could still keep going on high gear through the sand. We didn't have to shift into intermediate on account of the sand as you approached the railroad track. When we got to the railroad track we were going 8 or 10 miles an hour. The bell did not ring, being so close

to us, or we would have heard it, I didn't hear the bell and didn't hear any whistle. I would not say that the bell did not ring or the whistle did not blow. I was listening for the bell and didn't hear it. I was listening for the whistle and didn't hear it, that is the reason I say the whistle did not blow or the bell did not ring."

A witness named Mrs. Clare McGinnis did say the whistle was blown for the crossing and she heard it. She testified to seeing them approaching the crossing in their automobile apparently paying no attention and that she screamed to warn them. Her home was upon this road on the right hand side some distance north of the crossing. At that time she had followed and was attempting to catch a horse which had gotten out of their pasture, intending to put him back in again, and was but 8 or 10 rods from the crossing. She had just caught the horse when she heard the train approaching and the whistle blew for the crossing, which caused the horse to jump and jerk away from her, hurting her arm. She then turned around to watch the train and saw the automobile passing down the road from the north towards the crossing. She testified the "train tooted before these men got to the bridge" and while she was yet closer to the crossing than they were she saw the man on the right hand bend down and pass a bottle up to the man who was driving, who raised it to his mouth, and when they got near the track she screamed and then turned towards home not wishing to see the accident. Of what she observed she testified:

"It frightened me; these men were not paying any attention to the train, I thought they didn't know there was a railroad track there, that is the reason I screamed, I thought if they heard me scream they would look at the track."

Hardy and Hobby both testified that they did not

see or hear the woman, that they had nothing to drink with them; that there was no occurrence with a bottle such as she describes, that they had nothing to drink with them and neither of them drank. A peculiar incident in that connection which is not disputed is the fact that after the collision 3 bottles of beer were found scattered around in that vicinity which certain of the parties secured and had a drink from. Not denying that the bottles were found there at that time, both the parties in the automobile and the train crew positively deny that they had any beer with them on this occasion.

Just as the automobile went upon the crossing, and before it could clear the track going at the speed described, a freight train of 22 cars coming from the east struck and demolished the truck. Plaintiff and Hobby sprang clear of the collision just in time to save themselves, and two brakemen who were riding on the pilot beam in front of the engine also leaped in time, though one of them was injured by striking the cattle-guard fence. The accident occurred on a bright, clear day between 3 and 3:30 o'clock in the afternoon. The only grounds of negligence charged by plaintiff against defendant were failure to ring the bell and sound the whistle on approaching the crossing.

At the conclusion of plaintiff's testimony defendant's counsel moved the court for a directed verdict, urging amongst other grounds failure to show any negligence of defendant and particularly that the plaintiff's testimony showed the accident was attributable to his own negligence, and that of his driver which was imputable to him. This contention was presented at the close of all the testimony by motion and requests to charge, followed by motion for judgment notwithstanding the verdict, and motion for a new trial in which this claim was urged with various

others, including the claim that the verdict was against the great weight of evidence.

The only testimony that the statutory crossing signals of the coming train were not given is that of plaintiff and Hobby, who approached the crossing in this auto truck with a quantity of "stuff" thrown loose in the van behind them, running down the hill, across the bridge and up the slope on high speed to the crossing at the rate of 8 or 10 miles an hour, "not to exceed ten miles" as Hobby stated it, without stopping or slowing down to listen. They said the truck made no noise to interfere with their hearing other sounds, and gave negative testimony that they heard no whistle, bell or approaching train, which they fortify by the assertion they would have heard the whistle and bell had they been sounded, although they did not hear the noise of the approaching freight train of 22 cars running over 20 miles an hour until it was upon them. Against their negative testimony was the positive affirmative testimony of several witnesses to the fact that the whistle and bell were sounded. Plaintiff and Hobby both admitted they knew they were coming to a dangerous railroad crossing. Upon the west of the highway, as they describe the situation, they had an unobstructed view of the railroad track for a safe distance, the only danger being from the east by reason of a bank, shrubbery and trees which entirely obstructed their view of the track in that direction, so that it would have availed nothing to stop and look for a train from the east at any safe distance from the track. Conceding the sincerity of their testimony, it is based upon what observations they made as they rode along in their covered truck at 8 or 10 miles an hour and they are the only witnesses who so testify. Apparently disinterested witnesses, who had lived long in that vicinity and traveled this road often, flatly testify to the contrary, with

description of various points within four rods north of the track where an unobstructed view of an approaching train from the east can be had for various distances up to over 800 feet. These witnesses corroborated in substance the testimony of defendant's employees who were familiar with the locality, and the tests and measurements they made.

A careful study of the record is persuasive that the great weight of convincing evidence is to the contrary of plaintiff's claim that the crossing signals were not given and that in approaching defendant's track from the north after descending the small hill there was a continuous obstruction of the view to the east until the crossing was reached, but aside from other questions raised in this record the undisputed evidence of plaintiff's contributory negligence is conclusive against recovery.

It is conceded that plaintiff, with Hobby as his chauffeur, drove his auto truck to and upon the crossing at the regular rate of speed they were maintaining on their journey, without halting at what they say they knew to be a dangerous railroad crossing or complying with that saving duty under such conditions to stop, and having stopped to look and listen. His excuse is that they did listen as they drove along and the obstruction to their view to the east relieved them from the duty to stop. Whether it did or not was left to the jury as a question of fact.

In support of the contention that plaintiff's evidence raised an issue for the jury upon that proposition, it is pointed out that it shows the road as they approached the crossing was sandy and rutted, with a rise, or "bump," where the wheel track in the highway went upon the planks of the crossing, and the following testimony of plaintiff is emphasized:

"Q. In approaching this railroad you may state whether or not if the car had been stopped just be-

fore you got to the track could you have seen from the automobile an approaching train?

"A. We could not without we had driven right up to the track.

"Q. From the condition of the road and the rise there, was there to get over the tracks with your automobile, if your automobile had been stopped at that point, what would you have to do to get over the track?

"A. Well, I think we would have to back down and take a run at it again."

This excerpt and some other assertions by plaintiff of similar import are largely negatived by his own testimony and that of Hobby, who was driving, and makes no claim that they could not have stopped and started again within the right of way, which he testified extended north from the track "two or two and a half rods, something around 41 or 42 feet." The railroad right of way was shown without question to be 100 feet wide at this crossing and free from trees and brush. During his examination plaintiff also testified upon this subject as follows:

"Q. You know there is not any evergreen trees near the railroad right of way, don't you?

"A. Right up to the right of way.

"Q. The evergreen trees are in front of the house to the north of the track about 100 feet away, isn't it?

"A. That is inside their yard. * * * The right of way there is about four rods wide. It is fenced on each side, and there are no trees in the right of way. There is none of this brush that I speak of. * * *

"Q. How far down the track could you see an engine which is twice the height of your body, ten feet from the track?

"A. You couldn't see it until you got up to the track. You couldn't see it ten feet from the track. * * *

"Q. Your car would have been going slower if you were running on that (intermediate) would it?

"A. No, I don't know as it would—you could run much slower on intermediate, that is true.

"Q. You could stop quicker also than running on high?

"A. Yes, sir. * * *

"Q. Well, that is a pretty well cleared up territory over there, isn't it?

"A. Well, right along in that particular place it is not, no, because it is right there where there is a house.

"Q. Well, you understand what I mean by cleared land, it is not wooded land, is it?

"A. No, it is not wooded land. * * *

"Q. There is no shrubbery or small timber on the railroad right of way?

"A. Well, no. * * *

"Q. If you had stopped five, ten or fifteen feet with your machine that day, stating as you did that the train was within 20 feet of you when you got to the crossing, that accident could have been avoided?

"A. Yes, of course, if we had."

Hobby testified in part as follows:

"From the bridge going towards the railroad track we maintained a speed not to exceed ten miles an hour, I could run that truck on high at ten miles an hour going through the sand; if the sand became such as to slow our machine down I would have made the next move which would be to put the machine into intermediate and putting it into intermediate makes it go slower, but more powerful. * * * I knew the railroad track was just where it was, and I got ready to go over the railroad track from the bridge, that is about eight or ten rods, something like that, 120 to 130 or 140 feet back; from that point I knew the railroad crossing was there, and I took whatever steps I did take either by accelerating my car or in the handling of it to bring myself over that railroad track. * * * The north fence, the trees and house and all of that were still north of the railroad fence; the Stoyke house on your left as you approach the railroad track southerly on the highway was north of the railroad fence about 30 or 35 feet, something like that as near as I could guess, * * *

"Q. Well, you could (see) for 30 feet at least north of the north railroad fence, couldn't you, because that is where they are, you say?

"A. Well, sir, I couldn't tell you whether you could

see 30 or 20 feet. * * * I didn't stop the car 5, 10 or 15 feet back of the crossing, because I heard no warning of any trouble. I knew it was a dangerous crossing. * * * I didn't stop my car then to find out whether anything was coming, because there was no warning or noise of any kind to signal I should stop. That is the only reason I can give. * * * I had complete command of the automobile when I struck into this rut; it did not throw me on the track; my engine was going when I was on the track; I was making an effort to get over then; the same effort I was making getting up the hill, nothing extra. I didn't do anything after I saw the train but to make a get-away. * * * I presume I was 10 foot from the railroad track when I first saw the engine; my front wheels were right there close. In figuring ten feet I figure the distance from the front end of the car."

His reason for not stopping near the track within the right of way was not any fear of getting stalled, but because he heard no noise or warning to signal he should stop as he rode along. He had complete command of his automobile and was running on high gear with intermediate and low in reserve, to give "more power to shoot through" with if his engine became "almost exhausted on high," of which there was no indication. Under the facts shown by plaintiff's evidence the following language in the early case of *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274, where the subject is exhaustively discussed by Chief Justice CHRISTIANCY, is well in point here:

"That such failure, under such circumstances, to make use of any means to ascertain whether a train is approaching, before venturing upon the track, must of itself be pronounced negligence, as matter of law, is a proposition as sound in principle as it is well supported by authority."

The rule of reasonable precaution declared in that case has since been many times reiterated and applied to pedestrians, animal-drawn and motor vehicles. We

need not repeat what has so recently been said as to the duty of drivers of motor vehicles when approaching railroad crossings to recognize the danger—stop, look and listen—and make use of any available means to assure themselves no train is approaching before attempting to cross. Plaintiff could have done this, but did not take the trouble to do so. In *Shufelt v. Railroad Co.*, 96 Mich. 327, where the question of obstructed view was involved, this court said:

“These trains must run where the view is obstructed by cuts, by embankments, by trees, and other things. He who does not choose to stop and listen, where he cannot see, must suffer the consequences of his own negligence.”

We think this case is governed by the rule of a driver's duty as announced in *Sanford v. Railway Co.*, 190 Mich. 390; *Miller v. Railway*, 200 Mich. 388; *Gillett v. Traction Co.*, 205 Mich. 410; *Pershing v. Railway Co.*, 206 Mich. 304, and cases there cited. In the *Pershing Case* it is said of an obstructed view:

“It is conceded that Pershing did not stop until he reached the track and it is obvious that he did not look as soon as he could have seen, because if he had, and applied his brake, he could have stopped in a place of safety. * * * If he could have avoided injury by stopping, by listening, or by glancing to the east as soon as the obstructions would permit, and he failed to observe these duties, he did not use the care which an ordinarily prudent man does on such occasions.”

The judgment is reversed without a new trial, with costs to defendant.

MOORE, C. J., and BROOKE, FELLOWS, STONE, and SHARPE, JJ., concurred with STEERE, J. BIRD, J., concurred in the result.

Justice KUHN took no part in this decision.

JANUARY TERM, 1920.

PEOPLE v. RAJONA.

CRIMINAL LAW—MURDER—EVIDENCE OF ANOTHER CRIME.

In a prosecution for murder, the admission of testimony by five witnesses that soon after the killing defendant was identified by a colored man as the man who held him up and robbed him a short time before, *held*, reversible error which was not cured by the charge of the court that it was admitted to show the context. *MOORE, C. J., and STEERE, J., dissenting.*

Error to recorder's court of Detroit; Connolly (William F.), J. Submitted October 16, 1919. (Docket No. 108.) Decided January 6, 1920.

Albert Rajona was convicted of murder in the second degree, and sentenced to imprisonment for life in the State prison at Jackson. *Reversed.*

Doyle & Cameron, for appellant.

Alex. J. Groesbeck, Attorney General, Matthew H. Bishop, Prosecuting Attorney, and Van H. Ring, Assistant Prosecuting Attorney, for the people.

FELLOWS, J. Defendant was convicted in the trial court of murder in the second degree. The murder of one Clark occurred about 9 o'clock in the evening of February 7, 1917, on Rivard street near Catherine street in the city of Detroit. It is the claim of the prosecution that the defendant shot Clark, ran a few feet to the corner, thence west along Catherine street to Hastings street where he was intercepted by an officer and taken into custody. Defendant was a witness in his own behalf. He denied his guilt. It was

For authorities passing on the question of evidence of other crimes in criminal case, see note in 62 L. R. A. 193.

(638)

his claim that he had been in a store of one Verney and left there about 9 o'clock intending to see one Cianpano and go to bed; that the shots frightened him; he ran down Catherine street and was taken into custody. To sustain its claim the prosecution called two eyewitnesses to the shooting and the officers and others who participated in or who saw the pursuit and capture of defendant; these witnesses testified to defendant making a movement in his flight as though throwing something from him, to the finding of the revolver at that place in the undisturbed snow, and that it had the odor of fresh smoke upon it. Defendant in addition to his denial of guilt and his testimony as above stated produced Verney as a witness; his testimony corroborated that of defendant as to his being in the store and the time he left it. Character witnesses were also produced by the defendant.

In addition to the proof tending to establish the guilt of the defendant of the crime charged, it was permitted the prosecution in its case in chief to prove by five witnesses that when defendant was brought back to the corner a colored man named Hunter stated in substance that defendant had held him up about an hour before and took \$3 from him. The witnesses vary considerably as to what was said. A police officer testified that Hunter said, "He had a blue steel gun, an automatic"; no other witness testifies to this as a part of the conversation. One witness testified that defendant made no reply to Hunter, another that defendant said he didn't know him, another said he replied to Hunter by saying, "Why, I work," and one witness was permitted to testify, "Frank Hunter told me that this man had held him up and took \$3 from him," but did not believe he mentioned a revolver. "He just said he held him up." All this testimony was seasonably objected to and motions were made to strike it out. Hunter was not called as a witness, so that we have not the question before us which was

presented in *People v. Winney*, 196 Mich. 347. There the trial court had permitted proof that defendant had obtained a revolver and ammunition the night before the murder by means of burglary, but the trial court had carefully guarded defendant's rights and expressly instructed the jury that this testimony could be only considered upon the question of whether he had the means to commit the crime. But here Hunter was not sworn as a witness so as to be subject to cross-examination, his unsworn statement that defendant had held him up was received, and four of the witnesses make no mention of the "blue steel gun" forming any part of the conversation. The only effect of this testimony was to prove by such unsworn statements that defendant had committed another crime than the one for which he was on trial, and the trial judge admitted it upon the theory and statement that this court had sanctioned the admission of testimony of a series of crimes of the same character, while in his charge he stated that he admitted it to show the context, but nowhere in his charge did he tell the jury that the testimony could not be considered by them for the purpose of determining defendant's guilt or that proof of another crime could not be considered in establishing guilt of the crime charged. In the recent case of *People v. Rice*, 206 Mich. 644, a case where the question of intent was involved, we fully considered the question of receiving evidence of other similar transactions, part of the same system to defraud, and, while recognizing the general rule, we held that where the question of intent to defraud was involved, the case fell within the exception to the rule. While there are other exceptions to the rule, the crime of murder by shooting is not one of them. From the earliest day down to the last speaking of this court on the subject in *People v. Wheaton*, 207 Mich. 173, the general rule has been recognized that upon the trial of a criminal case the prosecution will not be per-

mitted to give evidence tending to establish the guilt of another distinct and independent crime.

In the instant case the defendant was charged in the information with the crime of murder; upon the trial he was called upon not only to meet this charge but also the further charge that he held up the colored man, Hunter. Upon this latter charge he was not confronted with his accuser, because Hunter could not be found; but unsworn statements of Hunter, made, not in open court where he might be subject to cross-examination and his testimony sifted, but upon the street corner, were received against defendant. This testimony was of a highly prejudicial character and the effect of its admission was in no way cured or attempted to be cured in the charge of the learned trial judge. The error went to the substantial rights of the defendant; it deprived him of a fair trial.

For this error the conviction must be reversed and the defendant remanded to the custody of the sheriff of Wayne county for a new trial.

BROOKE, STONE, BIRD, and SHARPE, JJ., concurred with FELLOWS, J.

MOORE, C. J. (*dissenting*). I do not agree with the conclusion reached by Justice FELLOWS. Even though it be conceded that the testimony to which he refers should have been excluded it does not follow that the case must be reversed for that reason. At the common law there is no right of appeal as of course from a conviction for crime. This right is the creature of the statute. In granting it the legislature may impose such terms as in its wisdom are calculated to promote the interests of justice. So many persons who were undoubtedly guilty of the crime with which they were charged have escaped punishment for errors that did not go to the merits of the question of their guilt as to become the subject of unfavorable

criticism of the courts. A remedy for that situation was sought and after a great deal of discussion Act No. 89 of the Public Acts of 1915 (3 Comp. Laws 1915, § 14565) was adopted. It reads:

"No judgment or verdict shall be set aside or reversed, or a new trial be granted by any court of this State in any case, civil or criminal, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

This act was construed by this court in affirming the case of *People v. Smolkiewicz*, 206 Mich. 1.

In the instant case there was testimony by eye-witnesses of the shooting by the respondent, under such circumstances as to constitute the crime of murder. The case is directly within the language of the statute. An examination of the entire record does not make it "affirmatively appear that the error complained of has resulted in a miscarriage of justice" but on the contrary a reading of this record establishes the guilt of the accused beyond any reasonable doubt.

The conviction and judgment should be affirmed.

STEERE, J., concurred with MOORE, C. J.

Justice KUHN took no part in this decision.

BYLE v. GRAND RAPIDS BLOW PIPE & DUST
ARRESTER CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PARTIES—ACTUAL PARTIES—ADMISSIONS—ESTOPPEL.

Where an application for compensation for the death of a son, under the workmen's compensation act, was filed by the father only, but during the preliminary proceedings thereto it was understood and acknowledged by the insurer that claimant was acting on behalf of himself, his wife, and minor children, all of whom were partial dependents, the industrial accident board properly entered an order continuing the weekly payments to the wife and children upon their petition, after the death of the father, under part 2, § 7, of said act, although the original award was entered in the name of the father only; defendant being estopped from now denying what it heretofore admitted to be true.

2. SAME—CERTIORARI—PARTIES—ESTOPPEL.

On certiorari to review said order, defendant cannot take the position that the claim of the mother and her children was not passed upon in the original proceedings, where it appears that the father was accepted by it as representing all of the dependents.

3. SAME—APPEAL—CERTIORARI—AMOUNT OF AWARD—ESTOPPEL—REVIEW.

Nor can defendant raise the question of the amount of said award, where it appears that it withdrew its appeal from the award of the arbitration committee to the full board wherein it claimed the amount was too high, and consented to an affirmance of said award.

SHARPE, STEERE, and FELLOWS, JJ., dissenting.

Certiorari to Industrial Accident Board. Submitted October 30, 1919. (Docket No. 67.) Decided January 6, 1920.

Jacob Byle presented his claim for compensation against the Grand Rapids Blow Pipe & Dust Arrester

On construction and effect of workmen's compensation acts generally, see notes in L. R. A. 1916A, 23; L. R. A. 1917D, 89.

Company for the accidental death of his son in defendant's employ. From an order awarding compensation to Minnie Byle and others, partial dependents of the son, upon the death of the father, defendant and the Fidelity & Casualty Company of New York, insurer, bring certiorari. Affirmed.

Angell & Turner, for appellants.

Dilley, Souter & Dilley, for appellees.

BIRD, J. Certiorari to the industrial accident board. Minnie Byle, the petitioner in the present proceedings, is the mother of Harry Byle, who, on the 8th of November, 1915, met with a fatal accident while in the employ of the Grand Rapids Blow Pipe & Dust Arrester Company. For some time after the death of the said employee, negotiations were carried on between the parents of said Harry Byle and a representative of the Fidelity & Casualty Company of New York, the insurer of said employer, which eventually resulted in the filing of a notice and application of adjustment of the claim on February 2, 1916. This application was signed and filed by Jacob Byle, the father of the deceased. An award was made to the applicant of \$4.06 per week for 300 weeks.

After the award was reviewed before the full board the respondents requested leave to withdraw the appeal and an order was entered, affirming the award. Compensation was duly paid by the defendants under this award to Jacob Byle until July 14, 1918; and respondents, being at that time advised of the death of said Jacob Byle, discontinued compensation payments. On October 26, 1918, a petition was filed with the industrial accident board on behalf of Jacob Byle and Minnie Byle, claimants, praying that the award of the committee of arbitration against the respondents be modified so as to include the petitioner, Minnie

Byle, and her four minor children, as dependents, and that the respondents be ordered to resume and continue payments on the original award until the 300 weeks' compensation has been paid. The defendants filed an answer, claiming that the award as entered by the committee of arbitration was correct in finding that Jacob Byle was the sole dependent and denied the right of the petitioner to maintain this proceeding, insisting that the board was without legal authority to make the order prayed for. An order, however, was duly entered by the board on April 4, 1919, in accordance with the prayer of the petitioner.

The appellants now claim, as stated in their brief, that the board erred in said order for the following reasons:

"(1) At the time of the death of the employee, Harry Byle, his father, Jacob Byle, was the only person dependent on the wages of deceased within the provisions of the workmen's compensation act.

"(2) The industrial accident board was without legal authority to modify the award of the committee of arbitration in the manner set forth in its order of April 4th, 1919.

"(3) If, as a matter of fact, there were other dependents and the board had authority to modify the award in the manner stated, it should have corrected the error in the amount of the original award and fixed the weekly compensation at two dollars and eighty-one cents (\$2.81) per week."

The industrial accident board found that, while neither the wife nor any person on behalf of the children had signed the application, it sufficiently appeared from all the correspondence, proceedings, and testimony that Jacob Byle, in signing this application, was acting for himself and his wife and all of his children, even though he only signed it himself. To show that the respondents recognized Jacob Byle and his wife and all of his children to have been dependent

upon the deceased, we quote the following from the correspondence set up by the industrial accident board in its findings:

"* * * On November 30, 1915, the respondent insurance company wrote to Jacob Byle, saying in part:

"* * * the information we desire is upon the question of how much you and your wife were dependent upon the earnings of your son, fatally injured November 8.'

"On December 17, 1915, said insurance company wrote a letter to the industrial accident board, saying in part:

"* * * We have endeavored repeatedly to effect a settlement in this case which will have to be on the basis of compensation to partial dependents as this employee left no total dependents.'

"On January 3, 1915 (1916), said insurance company wrote the industrial accident board, saying in part:

"* * * the partial dependents who survive him are not entitled to more than \$1.50 per week for a period of 300 weeks. In other words, if this employee kept \$9.00 out of his \$12.00 weekly wage for himself and turned over the balance to his parents, his partial dependents would be entitled to 50 per cent. of that amount, or \$1.50 per week.'

"At the same time the Fidelity & Casualty Company wrote a letter, a portion of which is last above quoted, it sent a supplemental report of the accident to the industrial accident board. The following is a true copy of the supplemental report:

"Schedule 3 is at this point quoted in full.

"The foregoing supplemental report shows that at that time the insurance company regarded the father and mother and all of the children as dependents upon Harry Byle, deceased. On January 10th, 1916, the insurance company wrote Mr. Byle, among other things:

"* * * It appears from my investigation that you, Mrs. Byle, and the rest of the family were not dependent upon your son's wages to the extent of more than \$3 per week'

"On February 1st, 1916, the insurance company wrote Mr. Byle, in part, as follows:

"Referring to the conversation between your good self and the writer, as respects the amount due you as partial dependents in a settlement * * * or must advise if this is not acceptable to you and the other partial dependents of Harry Byle, deceased, etc.'"

After the award was made the respondents objected to the amount thereof and claimed a review before the full board, as above stated, and filed a brief in which it was said, among other things, as was also set forth in the findings of the industrial accident board:

"The parents, Jacob and Minnie Byle, have made claim for compensation against the respondents for the death of their son, on the ground that at the time of his death, they were partially dependent on his earnings for their maintenance and the support of their home in Grand Rapids, it being claimed that deceased turned over to his parents his wages of \$12 per week and in return, received his board, room, clothing and \$1.50 per week spending money. After the expenses of deceased's maintenance and support had been paid, the parents kept the balance to run the home and support the other members of the family.

"On March 6th, 1916, a committee on arbitration was formed, heard the testimony introduced and awarded compensation for a period of 300 weeks at \$4.06 per week, for which award, respondents have appealed to this honorable board on the grounds set forth in the claim of review filed March 9th, 1916, and to which reference is hereby made. * * *

"On the question of the amount it cost deceased's parents to clothe and support him, as well as showing the extent of their dependency on his wages and contributions, the testimony is clear and conclusive. * * *

"The weekly sums expended in support and maintenance of deceased, total \$3 per week which deducted from the \$10.60, average weekly wage, leaves \$3.60 per week out of deceased's earnings upon which the parents and family were dependent.

"This, therefore, would entitle the claimant to 300 weeks' compensation at \$2.80 per week. * * *

"It resolves itself into a question of fact as to precisely what it costs the claimants to support their son. * * * thus leaving \$5.60 per week upon which the parents were dependent and entitling them to compensation at \$2.80 per week, for 300 weeks."

The respondents thereafter, however, withdrew their claim for review and the full board, as a matter of course, affirmed the report of the committee of arbitration and the board now says that, if the contest had been carried on to the end, it is very possible that the award would have been amended so as to cover the mother and minor children.

Counsel for claimants now contend—and the industrial accident board sustained the contention—that the respondents, having consistently and repeatedly admitted that Jacob Byle was not the sole claimant and dependent in the case, but that the other claimants were partially dependent upon Harry Byle, deceased, they ought to be estopped from now claiming that the things they have consistently admitted are not true. Mr. H. Dale Souter, who was one of the arbitrators representing the respondent insurance company, testified that in accordance with his understanding, the award was made to the father for the family. The letter of February 1, 1916, an extract of which is set up above, in the findings of the industrial accident board, clearly shows that they at that time recognized that the claimant was making the claim, acting for himself and on behalf of the other dependents. Having made these admissions, and after having treated the claimant as acting for himself and the rest of his family, the respondent should not now be heard to take a different position than that which it assumed before the arbitration committee. We are, therefore, of the opinion that there is no merit in the first contention of the

appellants. See *Roach v. Kelsey Wheel Co.*, 200 Mich. 299.

The second claim of counsel is based upon the contention that if the claim of the present petitioner was not presented and passed upon by the committee of arbitration, it cannot be now heard and determined upon a petition of this nature, but it must be heard and determined in accordance with the proceedings prescribed by the workmen's compensation law, and, as far as the present petitioner's claim is concerned, the defendants have never had their day in court. This claim, it seems to us, is also answered by what is set forth above, it appearing conclusively that the respondents treated Jacob Byle as a petitioner acting for the present petitioner and the dependent children. It is very apparent that there was no reason, under the circumstances as they arose, for the board to apportion the award. Both the committee of arbitration and the full board, on review, had a right to accept the respondent's assurances and treat the father as a representative of all of the dependents under the circumstances of this case.

Section 7 of part 2 of the workmen's compensation law (2 Comp. Laws 1915, § 5437) provides:

"* * * In case of the death of one such dependent [a person who has been determined to be a dependent as of the date of the accident to the employee] his proportion of such compensation shall be payable to the surviving dependents *pro rata*. Upon the death of all such dependents compensation shall cease." * * *

So that, in accordance with this statute, unless all the dependents of Harry Byle were deceased, the appellants having recognized them all as claimants, they were not legally justified in stopping payment of compensation and it was certainly within the power and jurisdiction of the industrial accident board, on petition being made, to order the respondents to continue

to make compensation in accordance with the law above set forth.

With reference to the last claim of the appellants' counsel, it is only necessary to say that no such claim as is now being urged was made before the board on the hearing. It was neither set forth in the answer nor in the supplemental answer nor was it assigned as error in the petition for certiorari. An application for review of the committee's award on this ground was voluntarily withdrawn by the appellants, who consented to an affirmance of the amount of the award by the board. Appellants are in no position, in view of the foregoing, to urge this question now.

The order of the industrial accident board which is before us for review is hereby affirmed.

MOORE, C. J., and BROOKE and STONE, JJ., concurred with BIRD, J.

FELLOWS, J. (*dissenting*). In *Pocs v. Buick Motor Co.*, 207 Mich, 591 (handed down December 22, 1919), we held that there was no provision either in the law or the rules of the industrial accident board permitting the board to grant rehearings. On the same day we handed down an opinion in *Diebel v. Construction Co.*, 207 Mich. 618, to the same effect. In the latter case it was claimed that compensation was being paid and was required to be paid by the wrong insurance company. In the instant case an award was made by the committee of arbitration on March 6, 1916, to Jacob Byle, as dependent; he was the sole applicant; an appeal was taken from this award but was abandoned, and on May 19, 1916, an order was made by the industrial accident board affirming such award. The proceedings here under review amount to a rehearing and a finding that Jacob Byle was not the sole dependent as found and fixed by the award of March 6, 1916, but that others were also dependent. However equitable

it may be to re-open this case and make a new and different award from the one entered some three years before, I do not think it may be done consistent with our holdings in the cases cited. For this reason I dissent from the conclusion reached by my brothers.

STEERE and SHARPE, JJ., concurred with FELLOWS, J.

Justice KUHN took no part in this decision.

**BOARD OF EDUCATION OF THE UNION SCHOOL DISTRICT
OF THE CITY OF OWOSSO v. GOODRICH.**

**1. STATUTES—CONSTRUCTION — GENERAL ACT INCONSISTENT WITH
LOCAL.**

That a general act will not repeal a special or local inconsistent act on the same subject is not a rule of positive law, but only one of the rules of construction recognized as raising such presumption, refutable and with the limitation that it must yield to an otherwise manifest legislative intent appearing in the language of the act, which is to be construed in the light of its subject-matter and purposes, other existing legislation upon the same subject, the relative times of their enactment, with all circumstances or related matter proper to consider for the purpose of discovering the legislative intent.

**2. SCHOOLS AND SCHOOL DISTRICTS—BONDED INDEBTEDNESS—GEN-
ERAL SCHOOL LAWS SUPERCEDE LOCAL ACT.**

The provisions of 2 Comp. Laws 1915, § 5712, authorizing any school district by a majority vote of its qualified electors to bond for an amount not exceeding 10 per cent. of its assessed valuation, *held*, applicable to the Union School District of the City of Owosso, in view of Act No.

368, Laws 1871, creating said district, providing that it should have all the powers and privileges conferred upon school districts by general law in addition to those conferred by the local act, although by said local act its bond limit at that time was fixed at \$50,000, which was the same as then provided in the general law.

3. STATUTES—CONSTRUCTION BY PUBLIC OFFICERS.

While not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws, and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature.

Certiorari to Shiawassee; Collins (Joseph H.), J.
Submitted January 13, 1920. (Calendar No. 28,991.)
Decided January 28, 1920.

Mandamus by the board of education of the union school district of Owosso to compel William R. Goodrich, secretary of said board, to give proper notice of a special meeting and election. From an order granting the writ, defendant brings certiorari. Affirmed.

Van R. Pond, for appellant.

Pulver & Bush, for appellee.

STEERE, J. The union school district of the city of Owosso was created by Act No. 368, Laws 1871. It succeeded to the rights, duties, liabilities, property and territorial limitations of a former union school district and embraces the present city of Owosso with some outlying contiguous territory. The initial section of the local act creating it provides:

"SECTION 1. *The People of the State of Michigan enact*, That the territory now embraced within fractional union school district number one, Owosso and

Caledonia, shall constitute a single school district, and shall be known and designated as 'Union school district of the city of Owosso,' and such district shall have all the powers and privileges conferred upon school districts by general law, and, in addition thereto, such powers and privileges as are hereinafter conferred by this act."

Section 5 of the act provides that the qualified electors of the created district may—

"by a majority vote of those present and voting at any annual meeting, or at any special meeting called for such purposes, raise by tax upon the taxable property in said district such sum or sums as shall be necessary to purchase lots, build school houses and furnish the same, provide apparatus and fuel, establish and maintain a district library, * * * authorize the board of trustees to borrow money, on the bonds of the district, for such terms of years, and at such rate of interest, not exceeding ten per cent. per annum, as the meeting may direct, for the purpose of building school houses and making additions thereto, or for the payment of bonds to become due: *Provided*, That such indebtedness shall at no time exceed fifty thousand dollars."

At a regular meeting of the board of education of said district held October 23, 1919, a resolution was adopted calling a special meeting of the electors of the district for the purpose of voting upon the question of borrowing \$200,000 on bonds of the district for the purpose of erecting and properly equipping a proposed school building which the board determined was a necessity. To that end the board also by resolution directed its secretary, defendant Goodrich, to prepare a requisite number of printed ballots for said election and give proper notice of time, place and purpose of such meeting as required by law. This defendant declined to do, filing written reasons for his refusal with the board, which were in brief that the bonded indebtedness of said district was limited by

the local act creating it to \$50,000, four-fifths of which amount had already been issued.

Application was then made by the board to the circuit court of Shiawassee county for a writ of mandamus to compel Goodrich to give proper notice of the special meeting and election to be held, as provided by said resolution, on the 6th of November, 1919. An order to show cause was issued and answer filed by defendant. Hearing was duly had upon the issue raised and a peremptory mandamus was issued by the circuit court requiring defendant to comply with the resolution of said board; also providing that as the time set for such special election had passed defendant should comply with any further order or resolution of the board fixing a later election day. Defendant then removed the proceeding to this court for review on certiorari to mandamus.

All resolutions, records and other proceedings necessary to clearly present the question are carefully prepared and in regular legal form. No facts are in dispute and no objection made to the regularity of any steps taken, aside from defendant's denial of the district's right to increase its bonded indebtedness beyond the limit specified in the proviso to section 5 of Act No. 368.

It is admitted the present bonded indebtedness of the district amounts to \$40,000. Under the proviso in section 5 of the act, further bonded indebtedness would be limited to \$10,000 and the single question of law involved is whether or not section 5712, 2 Comp. Laws 1915, operates to enlarge the district's power to bond as proposed. The trial court was of the opinion that it did under the rulings by this court in *Public Schools of Muskegon v. Smith*, 173 Mich. 570, and *Board of Education of Traverse City v. Straub*, 182 Mich. 665.

Defendant relies upon and cites numerous authori-

ties to sustain the proposition that a general affirmative act without express words of repeal does not as a rule operate to repeal a special or local act on the same subject even though the two are inconsistent and the terms of the general law are broad enough to include the inconsistent provision embraced in the special act. As to the *Muskegon* and *Traverse City Cases* it is urged that the important question there involved was the power of the districts to issue bonds, for which no provision was made in the special acts creating them, while in the instant case the power is expressly conferred, with a limitation, and the reasoning of the court in those cases, holding that the general school laws gave the districts such right, has no application here.

The rule which defendant invokes to the effect that a general act will not repeal a special or local inconsistent act on the same subject is not a rule of positive law but only one of the rules of construction recognized as raising such presumption, refutable and with the limitation that it must yield to an otherwise manifest legislative intent appearing in the language of the act which is to be construed in the light of its subject-matter and purposes, other existing legislation upon the same subject, the relative times of their enactment, with all circumstances or related matter which may aid construction and is proper to consider for the purpose of discovering the legislative intent.

It is not without significance that section 5712, 2 Comp. Laws 1915, authorizing any school district by a majority vote of its qualified electors to borrow money and issue bonds therefor to an amount not exceeding ten per cent. of its assessed valuation, is section 1 of chapter 6 of Act No. 164, Pub. Acts 1881, which is a comprehensive general law enacted with the indicated intent to amend, harmonize and recast existing school laws into a uniform system. It is a

lengthy enactment, divided into 13 chapters with sub-titles, being entitled, "An act to revise and consolidate the laws relating to public instruction and primary schools, and to repeal all statutes and acts contravening the provisions of this act."

As qualifying the purpose declared in the title, defendant emphasizes section 10 of chapter 13 of the act (2 Comp. Laws 1915, § 5760), which under the sub-title "Penalties and Liabilities" provides:

"All provisions of this act shall apply and be in force in every school district, township, city and village in this State, except such as may be inconsistent with the direct provisions of some special enactment of the legislature."

Section 1 of chapter 6 (2 Comp. Laws 1915, § 5712) was however radically amended by subsequent legislation, in its present form by Act No. 53, Pub. Acts 1913. In that connection it may be noted that Act No. 146 of the same session amended with similar title and in like manner section 17 of chapter 2 of the same act. As applied to the issue involved in *Burton v. Koch*, 184 Mich. 250, it was said of the legislative intent as indicated by such method of amendment:

"It is evident that the legislature intended there should be no doubt about the application of the amended law to every school district in the State. Intending to establish uniform qualifications for voters, the legislature by Act No. 146 of the Public Acts of 1913, instead of amending section 10 of chapter 13 by way of proviso or otherwise, amended section 17 of chapter 2 so as to indicate precisely the purpose to be accomplished."

In the instant case we have not only the legislative intent as indicated by a like method of amending another section in the same general school law by a separate act, and also the plainly stated legislative intent in Act No. 368, Laws 1871, that the union school district of the city of Owosso should have all powers and privi-

leges conferred upon school districts by general law and, in addition, such as are conferred by the local act itself, in which the powers granted by the general law are first named and made applicable. Following and in addition to them are such powers as are conferred by the local act creating the school district. There is nothing restrictive in the language adopted, which in the connection used fairly contemplates future as well as existing general laws conferring powers and privileges on school districts. In 1871 the general school law graded the power of district schools to borrow by the number of children in them between the ages of five and twenty years, with a limitation that "no school district shall have an indebtedness to exceed fifty thousand dollars for money thus borrowed" (1 Comp. Laws 1871, § 3726). Section 5 of Act No. 368 conforms to that limit. Whether thereby conferring any additional power or privilege upon the district for the time being is not disclosed. Such may perhaps be surmised, since the population of Owosso city in 1870 was but 2,065, as shown by the official census report of that year, and of the entire county of Shiawassee but 20,858. The city now has a population of approximately 14,000, and the school district an assessed valuation of over \$9,000,000, which under the general school law gives a bonding limit of \$900,000.

While not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws, and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature. We regard as worthy of consideration the opinions of the attorney general upon this subject in reply to inquiries from the State superintendent of public instruction and the superintendent of Jack-

son public schools, wherein the conclusion is reached that in certain cities whose school districts were limited in their power to borrow by former local acts (a form of legislation now prohibited by our Constitution) they may proceed under the general school law, if the qualified voters so determine, and issue valid bonds pursuant to the terms and within the limits of the general law. Attorney General's Report of 1913, pp. 277-387.

We cannot agree with defendant's contention that the reasoning of this court in the *Traverse City* and *Muskegon Cases* has no application here because it was there only held that the general law conferred a power not contemplated by the local acts creating the districts, while in this case the power to bond is expressly conferred by the local act, and limited. In those cases, as in this, power is conferred by local act to borrow money within specified limits for purchase of schoolhouse sites and erection of school buildings, if so determined by a majority of the qualified electors of the district present and voting thereon at a meeting duly held—in those cases by “loan” and in this by “bonds” of the district. A variation in wording rather than meaning which this court held in substance was a distinction without a difference in intent and power conferred. An examination of the briefs and records in each of those cases confirms, as we think the opinions themselves fairly show, that the controlling and most seriously considered question then before the court was the power of the districts to borrow money for the purposes proposed in excess of the limit fixed by their local acts. They having power to borrow, the implied right to issue bonds for the amount borrowed was a natural and logical sequence, within the purview of the general school law upon that subject.

We find no occasion to disagree with the conclusion of the trial court that the situation presented here is

in essentials closely analogous to that shown in *Board of Education of Traverse City v. Straub, supra*, or to disturb its mandate in this proceeding.

The judgment is affirmed.

MOORE, C. J., and BROOKE, FELLOWS, STONE, CLARK, BIRD, and SHARPE, JJ., concurred.

ABBOTT v. TRAVELERS INSURANCE CO.

INSURANCE—ACCIDENT INSURANCE—EVIDENCE—SUFFICIENCY.

In an action on an accident policy, on the issue as to whether insured's death was the result of an accident within the terms of his policy, evidence held, by a divided court, sufficient to take the question to the jury.

Error to Wayne; Lamb (Fred S.), J., presiding. Submitted April 22, 1919. (Docket No. 39.) Reargued January 28, 1920. Decided February 27, 1920.

Assumpsit by Edna S. Abbott against the Travelers Insurance Company, of Hartford, Connecticut, on a policy of insurance. Judgment for plaintiff. Defendant brings error. Affirmed, by a divided court.

Vandever & Foster, for appellant.

Walters & Hicks, for appellee.

STEERE, J. This action was brought by plaintiff as beneficiary named in an accident insurance policy for a maximum of \$5,000, with accumulations for ad-

Previous diseased condition as affecting liability for death or injury from accident, see notes in 34 L. R. A. (N. S.) 446; 52 L. R. A. (N. S.) 1203; 6 B. R. C. 530.

Arterio sclerosis as affecting right to recover under accident policy, see note in 3 A. L. R. 1304.

vanced premiums, issued by defendant on May 1, 1908, to her husband, William S. Abbott, who during his lifetime was a resident of Detroit, employed for 23 years as an agent and adjuster for a fire insurance company, having supervision of its business in the State of Michigan. His death occurred at his home in Detroit on November 10, 1916.

At the time of his death Abbott was 51 years of age, a heavy set man 5 feet 8 inches tall, and weighed about 210 pounds. On the evening of October 24, 1916, he returned home from his office shortly before 6 o'clock and went upstairs to the bath room to prepare for dinner. On his way down he made a misstep or slipped at the landing of the stairs and fell two steps, striking heavily in a sitting position. His wife and son hearing the fall went to him but he told them to leave him alone, soon arose to his feet and went on down to the dining room without assistance, though indicating in his walk that he felt the effects of the fall. He took his seat at the table and ate his meal with them, after which he read the evening paper for about an hour, then took a hot bath and went to bed, sleeping until after midnight, when his wife was awakened and found him in pain, apparently in his neck and back to which she applied hot cloths. He remained in bed the next day and slept much of the time. The following day he appeared somewhat stiffened and lame from the effects of his fall but went to his office and attended to some business. He returned home early and his wife found him in bed shortly after one o'clock. The next morning his condition was such that she called their physician, Dr. Simpson, who attended him professionally until he died on November 10, 1916, 17 days after the accident. A *post mortem* examination was made by Dr. Simpson, of which defendant's representatives, who had expressed a desire to be present, had no notice, and a subsequent

written request in its behalf for an autopsy under the terms of the policy deceased held was refused by plaintiff. She thereafter presented proofs of loss and claim as beneficiary under the accident policy, said proofs being accompanied by a verified statement of Dr. Simpson as attending physician, dated November 22, 1916, containing the following:

"5. State immediate cause of death: Portal obstruction.

"6. State predisposing or contributory causes of death, or complications, if any: Cirrhosis of liver, duration over 3½ years; cholangitis; fall, striking heavily and starting thrombosis of portal vein. * * *

"9. Was there a *post mortem* examination? If so, by whom? Give findings: Yes, by myself, Dr. Saford and Dr. C. R. Meloy. Gall stones—cholecystitis—cirrhosis of liver—ascites."

A previous death certificate by Dr. Simpson, of November 12, 1916, filed with the Michigan division of vital statistics, states:

"The cause of death was as follows: Cholecystitis and cholangitis—duration 2 weeks; cirrhosis of liver, duration 3 years . . . mos. . . . dys. Contributory, a fall 2 weeks ago."

Defendant in reply to plaintiff's claim and proofs of loss gave notice of denial of liability under the terms of its accident policy issued to deceased, stating as a reason that "death was not the result of bodily injury effected through external, violent and accidental means independently of all other causes."

This action followed, with pleadings properly framed to present the issues which were tried by jury in the circuit court of Wayne county resulting in a judgment on verdict in favor of plaintiff for the amount of the policy.

Defendant, by plea with notice thereunder and proof upon the trial, claimed as grounds of defense that

deceased had violated the warranties in his application under which the policy was issued wherein he asserted that he had no other accident insurance in any company or association and was "in sound condition mentally and physically" when the policy was issued and renewed from year to year; that the beneficiary and representatives of the estate breached by refusal on request the provision in said policy giving defendant, on demand, a right to examine the person insured and opportunity to make an autopsy in case of death, and that death was not caused by an accidental injury independent of all other causes. The court only entertained the last-named defense, which was submitted to the jury as an issue of fact, against defendant's motion and request for a directed verdict, the jury being told in the court's charge that was the only one of its defenses upon which defendant relied.

Counsel for defendant strenuously insist that its other defenses were relied upon and proof was made as to them. The record contains a request to charge as to one of those defenses and discloses no withdrawal of the others. Either the record is incomplete or the court was under a misapprehension in that particular, or meant by what was said to rule that the other defenses were not tenable. The statement amounted to an instruction to that effect. Plaintiff's counsel contend that in any event it was the only defense permissible because the only reason given by defendant on refusing payment when proofs of loss were tendered it, citing *Smith v. Insurance Co.*, 107 Mich. 270 (30 L. R. A. 368); *Jacobs v. Insurance Co.*, 183 Mich. 512. That proposition is contingent on a "knowledge of all the circumstances attending the loss" and its application might well be questioned under the evidence as to some of the defenses insisted upon, but the more serious and distinctly paramount

issue here, to which the evidence and efforts of counsel on both sides were chiefly directed, was whether plaintiff's testimony raised an issue of fact for the jury, or made out a *prima facie* case upon the essential allegation in its declaration that the insured's death resulted from an accident independent of all other causes.

Defendant by motion and request at the trial for a directed verdict, motion for a new trial, exceptions, etc., properly preserved for review its assigned errors, particularly emphasizing and urging in the trial court and here that no case was made out by the proofs under the conditions of the policy, that the verdict was without evidential support, was both against the overwhelming weight of evidence and contrary to plaintiff's own evidence.

The policy in question was purely an accident policy, the premium being \$5 per thousand per year, with plaintiff as beneficiary in case of accidental death. The material provisions of the policy to which the evidence and contentions of counsel were directed are that defendant—

"Does hereby insure Wm. S. Abbott against bodily injuries, *effected directly and independently of all other causes* through external, violent and accidental means (suicide whether sane or insane, is not covered), as specified in the following schedule: * * *

"If any one of the disabilities enumerated below shall result from such injuries *alone*, within ninety days from the date of accident, the company will pay the sum specified opposite such disability; or, if such injuries shall, independently and exclusively of all other causes, immediately, wholly and continuously disable and prevent the insured from performing any and every kind of duty pertaining to his occupation, and during the period of such continuous disability and within 200 weeks from the date of accident, shall result in any one of the disabilities enumerated below, the company will pay the sum specified opposite such disability, and in addition weekly indemnity as pro-

vided in Part B, to the date of death, dismemberment or loss of sight.

"For loss of life—the principal sum."

Members of deceased's family, friends and acquaintances testified that he was an energetic, hard-working man, apparently in general good health and attentive to his business, which called him from his home much of the time to different parts of the State and necessitated much travel; that he was fond of outdoor exercises and interested in athletics, had regularly attended to his business during the summer previous to his death and up to the time of his last illness, making business trips in July, August, and October, and took no regular vacation that summer except as he visited his family week-ends and over Sunday at Mullet Lake, where they spent the summer, at which times he played tennis, rowed, fished, went in bathing, etc., as was his custom when opportunity presented itself.

It was also shown by plaintiff's own witnesses that for over three years prior to his death deceased was afflicted with cirrhosis, or hardening of the liver, which Dr. Simpson, the only medical witness produced by plaintiff, said was "an old chronic proposition." He had so diagnosed Abbott's condition from objective and subjective symptoms in June, 1916, when attending him professionally for an attack accompanied by severe pains in the region of the gall bladder, at which time his urine was found to contain bile, and the doctor testified the attack was plainly cholangitis, or inflammation of the gall ducts. Of what his subsequent autopsy disclosed in that particular he relates:

"We found the liver small and hard, what in medicine we call cirrlosed liver, which is a hardening of the liver in the region of the gall bladder; that is under the ribs here, next to the liver, of course. The organs were all very much adherent, sticking together, the intestines were sticking to the liver, the gall blad-

der was stuck to the intestines; there was what we call adhesions all over, all those organs, that were old, thick, heavy adhesions, which is perfect evidence of inflammation existing for a long time, months or years probably. I found the gall bladder. It contained two or three gall stones. It was a thick gall bladder, the walls were thickened as though there had been an involvement there at various times, for some time. * * * The other organs were not noteworthy except the spleen, which is situated on the left side of the abdominal cavity, which was larger than normal."

Of the attack in June, 1916, when Dr. Simpson was called, plaintiff testified that her husband had spent the night at home and it came upon him early in the morning before he had arisen, preceded by no accident. Neither was a previous severe attack in March, 1913, which came upon him while at home accompanied by acute pains in the right side of his abdomen, having "a tendency to double him up," on which occasion he was removed to a hospital where he underwent an operation in which it was discovered that he had cirrhosis, or hardening of the liver, and he was cautioned by the surgeon to live a moderate life thereafter.

Dr. Simpson testified that when called to attend deceased in October he found him in bed, slightly jaundiced, with some fever and extreme tenderness in the upper part of the abdomen near the gall bladder. There were some very small bruises on his back near the hips which did not require any professional care and he turned his attention to the features of the case which did. An examination of his urine disclosed that it contained bile. The extreme tenderness in the region of the gall bladder and his fever grew less for some days after he commenced to treat deceased but the jaundiced condition continued, and on November 5th or 6th a developed distention of the abdomen indicated a collection of fluid there requiring relief by tapping, which the doctor performed on two occasions

taking away several quarts of fluid, cloudy with pus cells each time, the same being what is known as ascites, or the white part of the blood caused to ooze out through some membrane by an obstruction in the return flow of blood, the pus cells causing the cloudy appearance indicating infection present somewhere. The jaundice had become more apparent over the skin and in the whites of his eyes, and after the 7th or 8th of November the patient grew rapidly weaker until his death, on the 10th, the cause of which the doctor diagnosed and certified on two occasions as before stated.

Four witnesses of the medical profession were sworn and examined at length as experts touching the cause of death—Dr. Simpson being called by plaintiff and Drs. Kennedy, Meloy and Schmidt by defendant. In general their testimony was in harmony upon the symptoms, nature and effect of hardening of the liver, and related maladies which Dr. Simpson had described as connected with the case, cholecystitis being inflammation of the gall bladder and cholangitis of the gall ducts, resulting from infection, while cirrhosis of the liver is described as a chronic, incurable inflammation of that organ with progressive hardening by which changes take place in its structure causing the tissues to become fibrous and non-elastic with a binding effect gradually making it harder and smaller. Dr. Simpson likened the effect to "squeezing a sponge," having a "tendency, due to the contraction and the crowding, to cut off the supply (of blood) that comes from the portal vein," which he described as a vein about 3 inches long and about $\frac{1}{6}$ of an inch in diameter, deep in the abdomen, carrying the blood from the abdominal organs into the liver. Dr. Kennedy, clinical professor of surgery in the Detroit Medical College and a surgeon of wide experience, said of the disease:

"There is no cure known after a person is suffering

an attack of cirrhosis of the liver. It ultimately results in death, and on an average very few persons live longer than three years, very rarely a case will run longer than that. After the disease has once taken hold of the organs, it is progressive and the terminating event is usually ascites and death."

The conflict in the expert testimony was chiefly over Dr. Simpson's theory that death resulted in this instance from a traumatic thrombus, or blood clot in the portal vein, caused by the fall deceased experienced "starting thrombosis" of that organ, of which defendant's three medical witnesses denied the possibility, and the length of time before the cirrhosis and admittedly "infected condition of the bile ducts and gall bladder," which Dr. Simpson stated deceased had "for years," would necessarily terminate fatally.

Dr. Meloy, director of laboratories at Grace Hospital, who in his work with morbid anatomy-disease tissues to determine what ailments existed had performed between 550 and 600 autopsies in investigating the cause of death, was present at the autopsy performed by Dr. Simpson, and similarly described the conditions found. He diagnosed the cause of death as cirrhosis of the liver, and testified that while the fact a person is suffering from that disease is sometimes not discovered until revealed by a *post mortem*, the average length of life for persons found stricken with hardening of the liver is about three years. When asked as to the possibility of a fall having caused thrombus of deceased's portal vein he replied:

"It is my opinion that there was nothing anatomically, either gross or microscopic, which would indicate anything of that nature. * * * At the time of the autopsy there were no conditions found that would indicate he had received injuries as the result of the fall."

So far as relates to any facts disclosed by the autopsy illuminating Dr. Simpson's theory of a throm-

bus their testimony is not inharmonious. On cross-examination Dr. Simpson was asked and answered of the autopsy:

"Q. You found the diseased condition of the liver, the cirrhosis of the liver, did you not, as you testified?

"A. You mean when I did the *post mortem*?

"Q. You were of that opinion prior to the *post mortem*?

"A. Yes, I was of that opinion.

"Q. You found the cholecystitis and the cholangitis, did you not?

"A. Yes.

"Q. You had found those conditions and those conditions were due to natural causes, were they not?

"A. Yes.

"Q. The only thing that you did not find was the thing you suspected, which was a thrombus, didn't you?

"A. Yes.

"Q. And that was the important thing that you performed the *post mortem* for, that is the only thing that you did not find that you thought might exist?

"A. I didn't go at the *post mortem* to prove any conceived theory at all, I was after information as to what was the cause.

"Q. You had a preconceived notion that this man died from a thrombus?

"A. Yes.

"Q. What did you want to perform the autopsy for if it was not to find out if he had a thrombus?

"A. To see whether there was any other condition there that causes ascites, namely, any malignant growth, or something of that sort. * * *

"Q. Did you find anything?

"A. There was no malignancy, no."

His reason given for not ascertaining the condition of the portal vein was that he could not find it owing to the various organs in the region of the gall bladder being bound together by "dense, old adhesions," and the body had then been embalmed. Dr. Meloy, who saw the conditions, and the other physicians who

heard them described, testified that, while perhaps more difficult for those reasons, the portal vein could have been found, dissected out and examined for a traumatic injury with certainty as to whether or not there was a thrombus. Be that as it may, the portal vein was not examined and no thrombus was found as a result of the autopsy. Failing to find by his autopsy any thrombus or injury to the portal vein Dr. Simpson developed his theory as to the cause of death by inference on inference. Inferring there was a thrombus, though stating he was "willing to admit I cannot prove it," he inferred from the fall and illness of his patient that there was an injury to the portal vein causing the inferred thrombus, which he inferred obstructed the supply of blood to the diseased liver causing ascites and death, admitting on cross-examination that a common, and ultimately inevitable, cause of obstruction of the portal vein is cirrhosis of the liver, with which deceased had been afflicted for over three years, and adhesions such as he found in the region of or around the portal vein. Of his experience and professional knowledge upon the subject he was asked and answered in part as follows:

"Well, did you ever see or hear or read of a case where a thrombus was caused as the result of a personal injury to the portal vein, if so where?

"A. I don't know as I can cite any injury right now. No. * * *

"Q. Do you know of any authority or medical work who will cite a case of thrombus of the portal vein that is due to an accident?

"A. I have not looked up the authorities at all."

But passing defendant's expert testimony and contention that the great weight of evidence was against the verdict upon that issue, plaintiff's only expert witness, Dr. Simpson, admitted in connection with his theory of a thrombus that the portal vein, which lies deep in the abdomen, is "practically never injured ex-

cept indirectly," and "it was not probable that a man in perfect health would have a thrombus of the portal vein resulting from a fall," assigned a different cause of death in his certificate to the vital statistics division of the State department, and finally in his cross-examination touching the sum of his conclusions as to the cause of death testified as follows:

"Q. Well, doctor, you have apparently come to the conclusion, and are of the opinion, that deceased met his death as the result of a combination of causes?

"A. Yes.

"Q. That it was partially due to a diseased condition of the liver, or cholecystitis, or cholangitis, together with the fall which may have produced thrombus, is that true?

"A. Yes. * * * So I cannot say, as I said a moment ago,—I would not say any one of them independently was the cause of death.

"Q. But it was due to a combination of all the conditions which existed?

"A. Yes."

Accepting this as true we have by plaintiff's proofs a case where a progressive, incurable ailment, liable at any time to terminate fatally by its own development cutting off its supply of blood from the portal vein, acting together with the accident, in causal connection, caused the death which was, as sometimes expressed, produced "by the sum of the two causes."

Under the conditions of this limited casualty insurance the burden of proof was upon plaintiff to show that the accidental loss of life charged resulted directly from external, violent and accidental means, independently of all other causes. *Rathman v. Casualty Co.*, 186 Mich. 115 (L. R. A. 1915E, 980, Ann. Cas. 1917C, 459); *National Masonic Accident Ass'n v. Shryock*, 20 C. C. A. 3, 73 Fed. 774. In the last case cited Judge Sanborn summed up the proposition involved in conditional accident policies of this nature, where the claim is for accidental loss of life, and stated

what is by weight of authority recognized as, in substance, the established general rule, in part, as follows :

"The burden of proof was upon the defendant in error to establish the facts that William B. Shryock sustained an accident, and that the accident was the sole cause of his death, independently of all other causes. If Shryock suffered such an accident, and his death was caused by that alone, the association agreed by this certificate to pay the promised indemnity. But if he was affected with a disease or bodily infirmity which caused his death, the association was not liable under this certificate, whether he also suffered an accident or not. If he sustained an accident, but at the time it occurred he was suffering from a pre-existing disease or bodily infirmity, and if the accident would not have caused his death if he had not been affected with the disease or infirmity, but he died because the accident aggravated the effects of the disease, or the disease aggravated the effects of the accident, the express contract was that the association should not be liable for the amount of this insurance. The death in such a case would not be the result of the accident alone, but it would be caused partly by the disease and partly by the accident, and the contract exempted the association from liability therefor. These propositions have been so lately discussed and affirmed by this court that we content ourselves with their statement."

Citing numerous cases, to which may be added *Commercial Travelers Mutual Accident Ass'n v. Fulton*, 24 C. C. A. 654, 79 Fed. 423; *Hubbard v. Accident Ass'n*, 98 Fed. 930; *Hubbard v. Insurance Co.*, 98 Fed. 932; *National Ass'n of Railway Postal Clerks v. Scott*, 83 C. C. A. 652, 155 Fed. 92; *Stanton v. Insurance Co.*, 83 Conn. 708 (78 Atl. 317, 34 L. R. A. [N. S.] 445); *Illinois Commercial Men's Ass'n v. Parks*, 103 C. C. A. 286, 179 Fed. 794; *Maryland Casualty Co. v. Morrow*, 130 C. C. A. 179, 213 Fed. 599 (52 L. R. A. [N. S.] 1213); *Ætna Life Ins. Co. v. Bethel*, 140 Ky. 609 (131 S. W. 523); *Penn v. Insurance Co.*, 160 N. C. 399 (76 S. E. 262, 42 L. R. A. [N. S.] 597); *White*

v. *Insurance Co.*, 95 Minn. 77 (103 N. W. 735, 884, 5 Ann. Cas. 83) ; *Stokely v. Casualty Co.*, 193 Ala. 90 (69 South. 64, L. R. A. 1915E, 955) ; *Ward v. Insurance Co.*, 85 Neb. 471 (123 N. W. 456).

Plaintiff's counsel contend that the case was properly submitted to the jury under the rule and upon the issue of proximate cause, urging that the provisions of the policy should be construed as meaning that where the death results within 90 days of an accidental injury without which the insured would not have died within the 90 days, even though a contributing ailment without which the accident would not have caused death was involved, the death should be deemed to "result from such injuries alone" within the meaning of the policy, into which such language reads the principle of proximate cause.

This is an action *ex contractu*. Negligence is not an element of the contract of insurance. In tort cases not arising out of contractual relations of the parties the doctrine of proximate cause as applied to the claimed injury for which damages are sought is invokable by both defendant and plaintiff when different contributing causes are claimed on their respective theories as to the paramount, efficient and major or proximate cause, to be determined between two or more causes under the rule of selection applicable in negligence cases. Here the contract of insurance limits the inquiry to a single accidental cause from which alone it must be affirmatively shown that death resulted independently and exclusively of all other causes.

Deceased was a man of long and large experience in the insurance business, necessarily familiar as an adjuster with the general phraseology of policies and their interpretation. He was qualified to contract and better equipped to understand the contract of insurance under consideration than the average business

man. He traveled much in his business. His policy was sufficient to cover the customarily anticipated hazards of accidents while traveling. It was purely accident insurance and cheap compared with regular life insurance as to which he was not an insurable risk. It covered accident which resulted in disabling injury or death of a person afflicted with disease or bodily infirmities which had no causal connection with the accidental death or injury; it covered accidents which caused a nonpre-existing disease which resulted in disability or death, but it plainly excepted accidents to persons afflicted with a pre-existing disease which, co-operating with the accidental injury, caused disability or death, as a result of the two causes in combination.

Courts cannot recast such contracts for the parties into what might seem a more discreet or fair agreement, but must decide the controversy by the plain terms of the written contract the parties saw fit to make. We find no ambiguity or uncertainty in the explicit provisions of this policy permitting two constructions. If disease was an efficient, co-existing, contributing cause of death, it would be a palpable contradiction of the plain, ordinary meaning of the language used to say death resulted from the accident alone, directly and independently of all other causes. In *Binder v. Accident Ass'n*, 127 Iowa, 25 (102 N. W. 190), while the rule of construction most favorable to the assured is declared and fully recognized, it is said that nevertheless plain, explicit language cannot be disregarded. Passing upon a policy providing that the death or disability insured against must be "purely accidental and the direct result of an accident, and that the accident was the sole and only cause of the said member's death," the court said:

"If it be true, as the jury might have found under the evidence, that the diseased condition of the arteries

aggravated the effect of the accident, if there was one, and contributed to the disability occasioned thereby, then, under the express terms of the contract there was no liability on the part of the association."

The 90-day limitation in the policy is made of general application to "any one" of the enumerated disabilities resulting within that time after the accident from the injuries which it alone causes. In *Ætna Life Ins. Co. v. Bethel*, *supra*, following the general clause limiting liability to bodily injuries effected by accidental means "independently of all other causes," the specifications or enumeration of injuries covered by the policy provides, "If death results solely from such injuries within 90 days the said company will pay the principal sum of five thousand dollars" to the named beneficiary, and it was there held "indispensable to recovery that the evidence should show that the fall 'independently of all other causes' produced the death of Dr. Bethel."

In *White v. Insurance Co.*, *supra*, where a judgment on verdict for plaintiff was reversed because it conclusively appeared the deceased's death was due in part to diabetes, the injury aggravating the diabetic condition and inducing a "diabetic coma," the court, although using the term in discussion of the authorities, said:

"The rule of proximate cause, as applied to actions of negligence, cannot be applied in its full scope to contracts of this nature. 1 Cyc. p. 273."

It is conceded in this class of insurance that if the accidental injury independently and directly produces a fatal, nonpre-existent malady which operates as a resulting agency, the accidental injury as sole initial factor must alone be held the sole lethal cause, which is sometimes referred to in decisions and text books as the proximate, primary or immediate cause. Such

adjectives in their popular sense are convenient to emphasize that there is no other legal cause.

"The rules of proximate and remote causes, as understood in the law of negligence, cannot be justly or safely applied under a contractual stipulation that the injury or death must have 'resulted from the accident independently of all other causes,' and when an issue of fact is presented whether the person was suffering from a disease which had causal connection with the injury or death. * * * A discussion of proximate and remote causes can be pertinent only when it appears that there have been two or more causes and when a judicial selection must be made as between the different causes, and a choice made of one as the proximate cause," etc. *Penn v. Insurance Co., supra.*

It is urged for plaintiff that this case is squarely within and controlled by *Skinner v. Accident Ass'n*, 190 Mich. 353, wherein a judgment on verdict was sustained on the issue of whether death following an accident resulted independently from injuries caused by the accident, or was contributed to, or caused by, a pre-existing disease. As stated by the trial court plaintiff's claim and theory were that deceased died "of an ulcer or abscess following and caused by the injury which he received at the time he fell," while defendant's theory was that "death was due to a combination of difficulties set up by a cancer and prostatic abscess which resulted in pus absorption and terminal broncho-pneumonia." An autopsy was held and testimony introduced by the respective sides tending to support their conflicting claims. The existence of a cancer was denied by plaintiff but, if proven, plaintiff's counsel conceded "that unless the cancer was the result of the accident and the cancer caused the death, that we are not entitled to recover." The trial court submitted those issues of fact so raised to the jury under a fair charge which cannot be claimed to have left for their determination the technical issue of

proximate cause applicable to actions of tort. By direct application of the recognized rule of law to the case the court said:

"If you find from the testimony that whatever abscess there was that caused death was the direct result of the accident, why, unquestionably in that case plaintiff would be entitled to recover, if that was the sole cause; but if the cancer which is claimed by defendant to have existed prior to that time contributed to his death unquestionably, gentlemen, you must find a verdict for defendant, because then it would not be the sole cause, and any blow he received would not be the sole cause, and he can only recover where the accident was the sole cause."

Illustrative of the somewhat non-technical, popular sense in which "proximate cause" is sometimes used where the question of sole cause is the controlling issue, this case is cited in 2 Bacon on Life & Acc. Ins. (4th Ed.), § 522, in support of the text that "the fact that the accident precedes a disease causing death, or that the insured was afflicted with some disease not the proximate cause of death, is no defense," and *Jiroch v. Insurance Co.*, 145 Mich. 375, is also cited to the proposition that "what is the proximate cause is as a rule a question for the jury." In the *Jiroch Case* the issue was a question of sole cause. The trial court squarely charged the jury that if the amputation of plaintiff's foot was made necessary because the accident which he claimed to have suffered aggravated the effects of a pre-existing disease (diabetes), or the disease aggravated the effects of the accident, "then, in such case, the amputation would not be the result of the accident alone," and plaintiff could not recover. This court said in sustaining the charge and judgment that the evidence was ample to support the finding of the jury "that the disease which developed subsequent to the accident was attributable to it."

Upon this record plaintiff's evidence as applied to

the conditions of the policy in question fails to sustain the burden of proof upon the essential allegation that the insured's death resulted from accidental bodily injuries alone and was effected directly and independently of all other causes through external, violent and accidental means. The judgment should therefore be reversed, with costs to defendant, and a retrial granted.

BROOKE, STONE, and CLARK, JJ., concurred with STEERE, J.

BIRD, J. The conclusion reached by Mr. Justice STEERE that no issue was presented for the jury in this case is at variance with my opinion. If we exclude the medical testimony and consider only the lay testimony, I think a *prima facie* case was made for the jury. It appears from the record that Mr. Abbott, the insured, was 51 years of age, that he weighed 210 pounds, was in robust health, and had been for several years an unusually active business man. The only sickness which the record shows he had suffered in several years was in 1913, when he was ill for a period of three weeks with an ailment of the liver, and again in 1906, when he was incapacitated for one day. His business was that of State agent for a fire insurance company, and he traveled over the State looking after the company's interest. He was not only attentive to his business but appears to have been a great lover of sports and athletics. The testimony shows that during the last years of his life, when opportunity offered, he fished, rowed boats, played tennis, golf and baseball, waded in trout streams, and on one occasion ran in a fat man's race at some festivity. These activities in business and pleasure continued right up to the time he met with the accident. When he arrived home on the evening of his injury, he appeared well and happy, as usual. He went upstairs

to prepare for dinner. When called, he started down, and by a misstep, fell on the floor of the landing. When found, his back was against a riser and his head against the wall. When offered assistance by members of the family he complained of his back and begged them to leave him alone. He soon recovered sufficiently to go down to dinner. After dinner he smoked a cigar and read his newspaper, but retired earlier than usual after taking a hot bath. At midnight his wife applied hot cloths to relieve his back and neck. The following day he was confined to his bed, sleeping much of the time. The next day he was sore and stiff, but he dressed and went out. He was home by one o'clock in the afternoon and in bed and did not go out again. As the days passed he grew worse, his complexion became jaundiced, and at the last he was badly bloated. On November 10th he died after having been ill 17 days. There is no dispute about his injury, no dispute about the marks on his body as a result of the fall. When these facts were shown supplemented by his contract with defendant, I am of the opinion that a *prima facie* case was made without taking into account the medical testimony. *Semmons v. Benefit Ass'n*, 180 Iowa, 666 (163 N. W. 338). The proof in the present case is much clearer than in the one cited because in the case cited there was some question as to the manner in which the accident happened.

But plaintiff is not obliged to rely on this alone. She went further and showed by Dr. Simpson, the physician who attended him in his last sickness, that, in his opinion, he died from an obstruction in the portal vein. He testified:

"My opinion is that he died from an obstruction of the portal vein, which is a large vein through which all the blood from the intestines and stomach and liver—spleen, I should say, goes directly into the liver. I

think that was primarily the obstruction of that vein that caused his death."

And he further testified that, in his judgment, the injury was what caused that condition. The other physicians at the *post mortem* agreed with him that death was caused by a thrombus in the portal vein, but two of the doctors disagreed with him as to the thrombus being caused by the injury. Dr. Meloy, however, agreed with Dr. Simpson that that condition could be produced by an injury.

Had the testimony stopped here there certainly could have been no question but what a *prima facie* case had been made for the jury. If we are right about this, Can that *prima facie* case be destroyed because Dr. Simpson made some statements inconsistent with portions of his direct testimony? It is not the province of the court to determine what statements shall be accepted as the truth and what shall be rejected; that duty, as we have repeatedly held, rests with the jury. *Kelly v. Freedman*, 56 Mich. 321; *Watson v. Watson*, 58 Mich. 507; *People v. Hansen*, 183 Mich. 565; *Parnell v. Pungs*, 190 Mich. 638; *Burtch v. Child-Hulswit & Co.*, 207 Mich. 205.

It is said that Mr. Abbott had cirrhosis of the liver, and that this caused or contributed to his death. If it be conceded that he did have cirrhosis of the liver, under the testimony, it does not necessarily follow that he was near his end, or that his malady was fatal. Dr. Kennedy, one of the medical experts, testified that:

"It is true that a man might have cirrhosis of the liver and live ten years, if he had established a good collateral circulation it would have a tendency to relieve ascites, but would not by any means eliminate the poison of the liver which the liver secretes, and as far as death from ascites is concerned, it would tend to lengthen his life. Ascites is a result of cirrhosis of the liver."

Dr. Carl Meloy, one of the medical experts, agreed with this and said that:

"With the well established collateral circulation a man might die from an entirely different cause at a much later period."

Dr. Harry B. Schmidt, also one of the experts, testified that:

"After a man establishes a good collateral circulation he can live indefinitely with it."

And Dr. Simpson testified that, in his opinion, the patient did not die from cirrhosis of the liver, and it is further shown by the testimony that Mr. Abbott had few, if any, symptoms of a cirrhotic liver.

But it is said that because Dr. Simpson testified, on cross-examination, that death may have resulted partially from a diseased liver and partially from the fall, that under the rules applied by the courts in the construction of policies similar in wording, no recovery can be had.

In construing a similar provision as applied to a similar state of facts it was said in *Continental Casualty Co. v. Lloyd*, 165 Ind. 52 (72 N. E. 824), that:

"When two or more causes contribute to an injury, where there is doubt, or the facts of a character that equally prudent persons would draw different conclusions therefrom, in such cases, which of the contributing causes is the efficient, dominant, proximate cause, is a question to be submitted to the jury."

In that case the insured received a shock from a fall producing a cerebral hemorrhage. A tumor was found, which the doctor testified would take from six months to two years to form. The court in its further comment said:

"The tumor had impaired the resisting strength of the artery, but had not effected immediate danger to life. It was proper under the evidence for the jury

to view the impairment as a condition, and not as a cause, and to find that the fall was the originating, efficient, direct and proximate cause of death; that is, that the fall set in motion a force that progressed upon present existing conditions in natural, usual sequence to effect the fatal result. Twelve bricks are set in a row, eight inches apart. By accident, the first is toppled and falls against number two, which in turn falls against and throws number three, and so on until the number twelve is cast down by number eleven, and inflicts injury. With a proper footing, number twelve might, or might not, have fallen. In such case could it be said that because brick number twelve had a weak and imperfect footing, such imperfection was the direct, dominant, proximate cause of the injury? Who knows that the artery would not have been ruptured by the fall if it had been in a normal condition? Or who can tell that the insured would not have died from some other cause if the fall had not animated and accelerated the energy of the tumor. In fact, Dr. Ohlmacher testified that the autopsy disclosed in the vital organs of the deceased, in addition to the tumor, 'some affection of the mitral valve of the heart, some consequent enlargement of the heart, and beginning broncho-pneumonia, a beginning of acute Bright's disease, and a moderate fatty change in the liver.'

"From these considerations, it seems clear that the jury in its search for the proximate cause of death, had the right to include that even though the fall would not have produced death but for the impaired artery, the tumor at most was a remote, and not a proximate, efficient cause. *Fetter v. Casualty Co.*, 174 Mo. 256 (73 S. W. 592, 61 L. R. A. 459, 97 Am. St. Rep. 560), and *Freeman v. Accident Ass'n*, 156 Mass. 351 (30 N. E. 1013, 17 L. R. A. 753), are recent and very similar cases."

In *Hall v. Assurance Corp.*, 16 Ga. App. 66 (85 S. E. 600), the insured was a heavy man having a chronic affection of the kidneys. He slipped and fell while stepping down from the curb, resulting in an injury. He lived only a week. The doctor testified that he might have lived two years but for the accident. In

discussing the same question that is before us the court said in part:

"We think the supreme court of Georgia, in accordance with the general proposition stated above, has decided the principle controlling this case, and has announced the doctrine, not only that the disease from which the insured suffered, *must have been a substantially contributing cause to the injury, but that liability is not defeated merely because the existing disease aggravated or rendered more serious the consequences of the accident.* * * *

"And so in the present case, we think that it should have been left to the jury to determine whether the death of Judge Hall was caused by the fall, although accelerated by the incurable disease from which he suffered, or whether the disease was a contributing cause of the injury from which his death resulted. *We think that when the plaintiff shows a bodily injury, which, prima facie, was inflicted through external, violent and accidental means, the insurer, in order to rebut a prima facie right of recovery and to defeat liability must show (and of course he may do this by testimony which comes from the plaintiff's witnesses) that the injury in question was due in the first instance, either wholly or in part, to the disease from which the insured appears to have suffered. In other words, where as in the present case, it appears that the assured was bruised and wounded by a fall, which was apparently accidental, it is to be presumed, until the contrary appears from the testimony (whether for the plaintiff or defendant of course being immaterial), that the fall was the prime cause of the final result. If there is evidence that the result was caused by an intervening cause, or that such a cause contributed to the result, it is then for a jury to say whether or not the presumption raised by proof of an injury due to a cause prima facie accidental has been rebutted. Citizens' Bank of Tifton v. Timmons, 15 Ga. App. 815 (84 S. E. 232). The ascertainment of the proximate cause of death is the real object to be attained in every such case as that now before us. Lawyers, judges and psychologists have groped for centuries and settled on nothing more definite than proximate cause. To say absolutely that a death resulted solely and ex-*

clusively from an injury is to say that it would not have resulted without the injury, and this can never be said except as a matter of mere probability."

The same holding and substantially the same reasoning will be found in the following cases: *Bohaker v. Insurance Co.*, 215 Mass. 32 (102 N. E. 342, 46 L. R. A. [N. S.] 543); *Railway Mail Ass'n v. Harrington*, 136 C. C. A. 230, 220 Fed. 622; *Fetter v. Casualty Co.*, 174 Mo. 256 (73 S. W. 592, 61 L. R. A. 459, 97 Am. St. Rep. 560); *Moon v. Commercial Travelers*, 96 Neb. 65 (146 N. W. 1037, 52 L. R. A. [N. S.] 1203, Ann. Cas. 1916B, 222); *Lickleider v. Traveling Men's Ass'n* (Iowa), 166 N. W. 363; *Collins v. Casualty Co.*, 224 Mass. 327 (112 N. E. 634); *Fidelity & Casualty Co. v. Meyer*, 106 Ark. 91 (152 S. W. 995, 44 L. R. A. [N. S.] 493).

Applying the construction of these cases, if the question were in doubt as to which of the contributory causes spoken of by Dr. Simpson in his cross-examination was the efficient, dominant, proximate cause, it was a question to be submitted to the jury. This construction would make the policy actually mean more nearly what the purchasers of such policies think they mean when they purchase them. But to say that no recovery can be had under these insuring clauses in any case where a pre-existing disease may have contributed in some slight degree to the result is to make the contract of very little value to the insured.

I am of the opinion that the case was properly submitted to the jury and that the verdict should be affirmed.

MOORE, C. J., and FELLOWS and SHARPE, JJ., concurred with BIRD, J.

ABBOTT v. FIDELITY & CASUALTY CO.

This case is controlled by *Abbott v. Insurance Co.*, ante, 654.

Error to Wayne; Lamb (Fred S.), J., presiding. Submitted April 22, 1919. (Docket No. 48.) Re-argued January 28, 1920. Decided February 27, 1920.

Assumpsit by Edna S. Abbott against the Fidelity & Casualty Company of New York on a policy of insurance. Judgment for plaintiff. Defendant brings error. Affirmed, by a divided court.

Bishop & Kilpatrick, for appellant.

Walters & Hicks, for appellee.

STEERE, J. The material facts in this case are the same as in *Abbott v. Insurance Co.*, ante, 654, handed down herewith. The accident insurance policy sued upon was issued by defendant on May 1, 1911, to plaintiff's husband, William S. Abbott, naming her as the death beneficiary, agreeing to indemnify her (as stated in plaintiff's declaration) "against the death of the said William Sherman Abbott resulting directly, independently and exclusively of all other causes, through accidental means within ninety (90) days from the date of receiving said accidental injuries, in the sum of five thousand (\$5,000) dollars."

Defendant pleaded the general issue. The same testimony by Dr. Simpson was used in both cases. The other medical witness (Dr. Safford) did not claim, and testified he was not aware any one claimed, Abbott's death was the result of this accident exclusively and independently from all other causes. Request by defendant for a directed verdict was denied and the

case submitted to the jury under the comparative doctrine of proximate and remote causes, resulting in a verdict and judgment for plaintiff. The controlling questions involved are as in the companion case above referred to and governed by it.

The judgment should be reversed with costs to defendant and a new trial granted.

BROOKE, STONE, and CLARK, JJ., concurred with STEERE, J.

BIRD, J. For the reasons stated in *Abbott v. Insurance Co.*, ante, 654, handed down herewith, I think this case should be affirmed.

MOORE, C. J., and FELLOWS and SHARPE, JJ., concurred with BIRD, J.

MISNER v. STANGEL

APPEAL AND ERROR—TIME OF PERFECTING APPEAL—SUPREME COURT RULE.

Although defendant did not appeal within the 20 days prescribed by 3 Comp. Laws 1915, § 13753, where one of the other parties to the proceeding had perfected an appeal pursuant to the provisions of said statute and the rules of the Supreme Court, defendant had the right to appeal under Supreme Court Rule No. 61.

Cross-appeals from Ottawa; Cross (Orien S.), J. Submitted January 18, 1918. (Docket No. 145.) Decided December 27, 1918. Resubmitted June 26, 1919. Former opinion affirmed February 27, 1920.

Bill by Charles E. Misner against Claus H. Stange, Walter I. Lillie, and Anna Wegner for the foreclosure of certain liens. Defendants Lillie and Wegner filed separate cross-bills asking affirmative relief. From the decree rendered, defendants Lillie and Wegner appeal. Modified, and affirmed.

Charles E. Misner, in pro. per.

Leo C. Lillie, for defendant Lillie.

Charles E. Soule, for defendant Wegner.

ON REHEARING.

BIRD, J. A rehearing was granted in this case on a question of practice affecting the appeal of defendant Lillie. The contention is made that this court was without jurisdiction to grant Mr. Lillie affirmative relief because he did not file his claim of appeal within the 20 days provided by statute. 3 Comp. Laws 1915, § 13754. We were of the opinion on the former hearing that the right to a dismissal had been waived. 203 Mich. 411. It appears by the record that defendant Wegner filed her claim of appeal within the 20 days prescribed by statute. Several days thereafter Mr. Lillie filed his claim of appeal but not until after the 20 days had expired.

It was held by this court in *Guthrie v. Leelanau Circuit Judge*, 197 Mich. 321, that a failure to pay the appeal fee within 20 days after filing the decree deprived the court of jurisdiction. The question whether a like holding should be made for failure to file the claim of appeal within 20 days has not been before the court, under the present act, except in a case where the court already had jurisdiction. Assuming that the court will, by analogy, hold that a failure to file a claim of appeal within 20 days is jurisdictional, the question is presented in the instant case

whether the failure of an appealing party to file a claim of appeal before the 20 days have expired is fatal, where the court has already acquired jurisdiction of the subject-matter by force of a claim of appeal seasonably filed by another party.

Defendant Wegner filed a seasonable claim of appeal. Later Mr. Lillie filed a belated claim of appeal. Had this court's jurisdiction depended on Mr. Lillie's appeal we would be bound to say, under the authority of the *Guthrie Case*, that the court was without jurisdiction and his appeal would be dismissed. But it can hardly be claimed that Mr. Lillie's appeal could be dismissed on jurisdictional grounds, in view of the fact that the court already had jurisdiction of the case by virtue of defendant Wegner's appeal. May we not, and ought we not, to say that the failure of Mr. Lillie to file his claim of appeal within the 20 days was but an irregularity which could be waived by the opposite party?

In the present case the record for appeal was settled by the parties before the chancellor, transmitted to this court and the case was noticed for hearing in this court. No motion has been made in this court to dismiss the appeal, simply an objection to any affirmative relief being given thereunder. Under these circumstances it ought to be held that the irregularity was waived. In *Lum v. Fairbanks*, 155 Mich. 23, in considering an application to dismiss an appeal, the court said:

"So that, whether we consider the appeal as taken and perfected under 1 Comp. Laws, § 552, or under the statute of 1907 [Act No. 340], the appeal must be dismissed, *unless it should be said that the right to a dismissal has been waived. There has been no waiver; for although,*" etc.

This case clearly recognizes the right to a dismissal may be waived.

Again, in *Bennett v. Hickey*, 110 Mich. 628, it was held that the appellee had waived his right to have the appeal dismissed, the court saying:

"We think, however, that this motion should be denied upon the ground that the right to insist upon the waiver of appeal had in turn been waived by counsel for the appellees, for the reason that counsel did not assert his intention to rely upon the statutory waiver when informed by counsel for appellant that he intended to make the return at once, and that he should not be inconvenienced by the delay, when counsel for the appellees told him that the return had not been made within the time prescribed by statute."

The principle of waiver was also recognized in *Trombly v. Klersy*, 139 Mich. 311.

But it is urged that the case of *Munroe, Boyce & Co. v. Ward*, 207 Mich. 369, is conclusive of the present one. In that case the defendant filed a claim of appeal seasonably. The plaintiff, upon learning that defendant had appealed, also filed its claim of appeal, but not until after the 20 days had expired, and it was held that plaintiff's appeal could not be considered, citing the *Guthrie* and other cases. The distinction which has been pointed out herein was not presented to us in that case, neither was there any showing of waiver. Had our attention been called to the fact that the court already had jurisdiction of the case by force of defendant's appeal, it is doubtful whether we would have placed our refusal to consider plaintiff's appeal on jurisdictional grounds. I have no doubt that a correct result on this question was reached in *Munroe, Boyce & Co. v. Ward*, because of the failure of plaintiff to file its claim of appeal seasonably. While this was but an irregularity no attempt was made to show that the irregularity had been waived. But in the present case the showing is made. It is, therefore, unnecessary to overrule *Munroe, Boyce & Co. v. Ward*, in order to affirm the present case. If the present

case be affirmed, a construction of the statutory provision will result in this:

(a) A claim of appeal must be filed by some of the parties to the litigation within 20 days after decree is filed in order to give the court jurisdiction to entertain it.

(b) The failure of an appealing party to file his claim until after 20 days have elapsed, where the court has previously acquired jurisdiction, is an irregularity, which will bar his right to have his case considered unless the same has been waived.

It so clearly appears that the right to insist upon a dismissal of Mr. Lillie's appeal has been waived, I am of the opinion that the same conclusion should be reached upon the rehearing as was reached on the former hearing.

The decree is modified and affirmed. Defendant Lillie will recover his costs of the rehearing.

STONE, J. In view of Rule No. 61, lately promulgated by this court, I concur in the result.

STEERE, BROOKE, FELLOWS, and SHARPE, JJ., concurred with STONE, J. MOORE, C. J., did not sit.

Justice KUHN took no part in this decision.

HARRISON v. EASSOM.

1. FRAUDS, STATUTE OF—ORAL LEASE FOR MORE THAN ONE YEAR VOID.

Under the statute of frauds (3 Comp. Laws 1915, § 11981), an oral lease of lands could not extend beyond one year.

2. SAME—ORAL CONTRACT FOR CONVEYANCE OF LAND VOID.

An oral agreement for the conveyance of land is void under the statute of frauds (3 Comp. Laws 1915, § 11981).

3. SAME—VALIDATED BY PART PERFORMANCE.

A void contract for the sale of lands is sometimes said to be made valid by acts in part performance.

4. SPECIFIC PERFORMANCE—NOT A MATTER OF RIGHT BUT IN DISCRETION OF COURT.

Specific performance of a contract, whether written or oral, is not a matter of strict legal right, but rests in the sound discretion of the court.

5. SAME—ORAL CONTRACT FOR CONVEYANCE OF LAND—PART PERFORMANCE—EQUITY—FRAUD.

In proceedings for the specific performance of an oral contract for the conveyance of land, the acts of part performance by plaintiffs, permitted by defendant as though accepting the void contract as valid, must be to an extent and of a kind to create such strong equities in plaintiffs' favor that courts of equity should not permit the statute of frauds to be used as an instrument of fraud.

6. EVIDENCE—CONCLUSION.

Plaintiffs' assertion that they took exclusive possession as owners of a strip of land is but a conclusion not borne out by their own testimony, which shows that they took it with other land under an oral lease.

7. FRAUDS, STATUTE OF—ESTATES—ORAL CONTRACT AS TO LAND—POSSESSION.

Where plaintiffs and defendant orally agreed to work certain land together, including eight acres which was to go to plaintiffs, selection of which had not yet been made, their possession was concurrent, and plaintiffs could not acquire a new or different estate under an oral contract to work all the land and give defendant a share.

8. SAME—SPECIFIC PERFORMANCE—PART PERFORMANCE OF ORAL CONTRACT—POSSESSION.

Taking possession under an oral contract must, to become an element of part performance, be exclusive, open, and notorious, under a claim of ownership.

9. SAME—ORAL CONTRACT TO CONVEY—LANDLORD AND TENANT—PART PERFORMANCE.

Where plaintiffs went into possession of land as defendant's tenants, and continued in unbroken possession from the time of entry without having surrendered possession, merely continuing their possession under a different claim of right than the tenancy under which they were let in could not in itself constitute an act of part performance of an oral contract to convey.

10. SAME—EVIDENCE—MATERIALITY.

In proceedings for the specific performance of an oral contract to convey a strip of land, while an oral lease involving the premises in dispute, and as to the amount plaintiffs owed defendant thereunder, were not directly in issue, evidence in relation thereto was competent for whatever light it might throw upon the nature of plaintiffs' possession and the termination of the lease.

11. SAME—PART PERFORMANCE—EVIDENCE—SUFFICIENCY.

The conclusion of the court below that, under the circumstances disclosed, the occupancy shown prior to the commencement of this suit "cannot be said to be actual, open, notorious, hostile, or adverse possession of any part of the land," entitling plaintiffs to specific performance of an oral contract to convey, *held*, sustained by the record.

Appeal from Kalamazoo; Weimer (George V.), J. Submitted October 17, 1919. (Docket No. 83.) Decided February 27, 1920.

Bill by Alonzo D. Harrison and another against Mary Eassom for the specific performance of a land contract. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Lincoln H. Titus, for plaintiffs.

Alfred S. Frost, for defendant.

STEERE, J. Plaintiffs seek by bill for specific performance to compel defendant to deed to them an 8-acre parcel of land near the city of Kalamazoo in the southwest quarter of the northeast quarter of section 7, town 3 south, of range 12 west, Texas township, Kalamazoo county, specifically described as "the south 8 acres of the north half of the southwest quarter of the northeast quarter of section 7," in said town and range.

Defendant at one time owned the entire south half of the northeast quarter of said section 7 and resided upon the same for some nine years, the house, barn, outbuildings, etc., being situated upon the northwest corner of the 80 acres. She thereafter sold the west 40 acres upon which was the residence and buildings, retaining the east 40 acres. At the time of the transactions involved in this litigation a man by the name of Garwood owned the west 40 acres upon which there was a mortgage of \$550.

Prior to May 2, 1917, defendant owned a house and lot in the city of Kalamazoo valued at \$2,300 upon which there was a mortgage of \$950, and plaintiffs, with whom she was then on friendly terms, owned a house and lot in Kalamazoo known as Terrace Place which they valued at \$2,400, upon which there was a mortgage of \$800. Defendant learned that Garwood was desirous of selling his 40 acres or exchanging it for city property and had placed it in the hands of a real estate agent in Kalamazoo for that purpose. She was desirous of exchanging her house and lot in Kalamazoo for a part of the Garwood 40 acres where the buildings were. He wanted to dispose of the entire 40 in which his equity greatly exceeded the equity in her city property. She discussed the matter with plaintiffs who became interested and negotiations followed looking to their joining the equity in their city property with hers and exchanging the two for the

Garwood property, plaintiffs to pay the incumbrance on the entire 40 acres; she was to take 12 acres located in the northwest corner where the buildings were, as she was desirous of securing her former home, and they were to have 28 acres in all, consisting of the south half of the 40 acres, and an additional 8 acres to be selected by them from specified adjacent locations, either in the Garwood 40 or in her 40 acres joining it on the east. All parties are in harmony as to their understanding up to that point.

The disagreement out of which this litigation arises is over the location of the 8 acres. Defendant contends it was agreed plaintiffs might have their choice of two 8-acre parcels—one immediately to the east and at the rear of their south half of the Garwood 40, in the land belonging to her, or an 8 acres from the north half of the Garwood 40 at the rear and east of her 12 acres. Plaintiffs contend that they were to have their choice of three 8-acre tracts—including the two which she concedes, and also an 8-acre strip along the south side of the north half of the Garwood 40, which they subsequently selected and she refused to convey to them.

It was also the understanding between the parties to this suit that after the deal was consummated with Garwood they would take possession of the premises, occupying the buildings belonging to defendant, and plaintiff Alonzo Harrison should run the 80-acre farm, working defendant's portion on shares. Having reached an agreement with Garwood on May 2, 1917, they all went to the office of an attorney and had conveyances made for the exchange. Plaintiffs and defendant deeded to Garwood their city properties subject to the incumbrances upon them and he deeded his 40 to them as they directed, before they separated. They apparently had no difficulty in agreeing that plaintiffs should have the south half of the 40 acres,

between which and the north half an easement for an unopened highway had been granted some years previously in an abortive project for platting, but they failed to reach an exact understanding as to the additional 8 acres plaintiffs were to have. After a protracted discussion without reaching any definite conclusion, which continued until Garwood grew tired of waiting, they accepted his suggestion that he deed defendant the north half and plaintiffs the south half of his 40 acres, and after they had gone out there plaintiffs make their selection from one of the descriptions which had been proposed. They authorized him to convey the 40 to them as he suggested with the understanding between themselves that plaintiffs could make their selection from certain descriptions after they moved upon the farm, whether with a choice of two or three descriptions is in dispute.

Soon after the deal with Garwood was closed plaintiffs and defendant moved upon the premises, under an oral agreement by which Harrison was to have a five years' lease from her. He testified that he went into possession of the whole place at that time and worked the whole 80 acres for a year. They are not in harmony as to many of the terms of this oral lease but agree that he was to occupy the premises as a tenant and work her land on shares. His general statement of the understanding is: "We were both to work the place together and each have one-half, except my rye and corn on the 20." She was to assist Harrison financially in getting a team, seed and other essentials for operating the farm, which she did as he testifies, and was to have quarters in the house. She lived there for several months, at times assisting him at outdoor work upon the land, but trouble soon developed between her and plaintiffs, both indoors and out, which grew more acute as time went on, and early in the fall she resumed her residence in the city. In March

of the following spring she served a formal notice on plaintiffs as her tenants to quit and surrender up to her possession of the premises, defined by a legal description of the 80-acre farm. They left the place in May, at the end of a year's occupancy, and have resided elsewhere since that time.

These parties never had any written agreement between them in relation to this farm, and are now at variance as to material parts of their oral agreements. Plaintiffs' oral lease of the premises could not extend beyond one year, and their oral agreement as to the 8 acres in dispute, specific performance of which is sought to be enforced, was void under the statute of frauds (3 Comp. Laws 1915, § 11981) unless validated by subsequent part performance, as to which the burden of proof rested upon plaintiffs. Finding that they had failed in that particular the trial court dismissed plaintiffs' bill.

It appears quite clearly that failure of these parties to arrive at an agreement as to the exact location of the 8 acres at the time Garwood deeded his 40 acres to them resulted from defendant's objection to plaintiffs having the strip they now claim, which would take about 25 trees of her apple orchard and shut her off from the dedicated but unopened highway between the north and south halves of the 40 acres. Harrison expressed a preference for this, while she wanted him to take the 8 acres off the east end of the north 20 acres, leaving her the west 12 acres, or 8 acres from the south half of her own 40 acres adjoining his 20 on the east. At that time they were friendly and ostensibly considerate of each other, as Garwood's testimony indicates. He states that when she proposed the east end of the north 20 acres Harrison said it would hardly be fair to her as it would shut her off from her back 40, and when he proposed the strip along the south side of the north 20 acres she

protested it would not be fair to him because it would put all the road on his land.

Defendant testified that she did not consent to the 8 acres in question being one of those from which selection could be made and plaintiffs that she did. Garwood testified he thought both agreed to his proposal that the deferred selection could be made out of the three pieces which had been discussed, saying, "That is the way it looked." Of this issue the trial court said:

"I am satisfied that the plaintiffs understood they were to be permitted to choose from three parcels. Whether or not defendant so understood the bargain, I am unable to say."

But assuming that their minds did meet upon the proposition as contended by plaintiffs, the court found they had shown no such possession and part performance as would validate their oral contract and entitle them to a decree in a court of equity for specific performance.

Specific performance of a contract whether written or oral is not a matter of strict legal right but rests in the sound discretion of the court. Upon the subject of compelling performance of an oral contract for sale of land, it was said by Chief Justice COOLEY in *Dickinson v. Wright*, 56 Mich. 42:

"A void contract for the sale of lands is sometimes said to be made valid by acts in part performance: *Davis v. Stobridge*, 44 Mich. 157; but by this is commonly only meant that one party by suffering the other to take action under and in reliance upon it as if it were valid, without notifying him of any purpose to insist upon its invalidity, thereby establishes against [himself] certain equities in respect to the contract which may be so strong in some cases as to justify a court of equity in enforcing it against him specifically, as if it were and had been from the first without defect."

In other words, the acts of part performance by plaintiffs, permitted by defendant as though accepting the void contract as valid, must be to an extent and of a kind to create such strong equities in plaintiffs' favor that the court is moved to decree enforcement under the principle that courts of equity should not permit the statute of frauds to be used as an instrument of fraud. In this case, when Harrison shortly after taking possession of the premises as her tenant first advised defendant of his intention to select the 8 acres in question she at once objected and made known her attitude as to it. He was not deceived or misled into making valuable improvements upon it in reliance on her recognition of the contract or of his claimed selection under it. He in fact made no improvements on the 8 acres. It was farm land, in no way set apart from or treated differently than the rest of the land to which she held title. Beyond the fact it was cleared land there were no improvements on it except a small portion of the southern edge of her orchard near the farm house. While on the place he worked the 8 acres the same as the rest of her holding and divided what it produced with her. His assertion that he then took exclusive possession of it as owner is in the nature of a conclusion, and not borne out by his own testimony as to the situation. He testified of his tenancy in part as follows:

"I went into possession of the whole place in May, 1917, and I worked it for a year until I was ordered off. * * *

"Q. You worked that whole 80 acres last year?

"A. Yes, sir.

"Q. The same arrangement applied to the whole farm?

"A. Yes, sir. It didn't apply on mine where I had corn and rye in.

"Q. That was on your 20?

"A. Yes, sir."

When defendant by consent of all parties took title to the north 20 acres the right to possession of it went to her with the deed she received. Plaintiffs then concededly have not exercised the selection they now claim and were let into possession as her tenants under an oral lease good for one year only as the statute expressly provides. Accepting Harrison's testimony that they were to work the place together and each have one-half, their possession and hers were concurrent and theirs could not while such relation existed indicate a new or different estate. Taking possession under an oral contract must, to become an element of part performance, be exclusive, open and notorious, under a claim of ownership. The mere continuance of their former possession, if exclusive, under a different claim of title or right than the tenancy under which they were let into possession could not constitute part performance of an oral contract for the purchase of land. These principles as applied to specific performance of an oral contract for sale of real estate are too well settled to demand citation of authority.

Plaintiffs' bill to enforce specific performance was filed April 13, 1918. Harrison testified that he went into possession of the whole place in May, 1917, working it for a year on shares, except the south 20 acres which he owned, and being notified to quit went off the place in May, 1918. He had then made no improvements on this 8 acres, had not paid or taken care of the mortgage according to the conceded terms of his oral contract and had worked it on shares, attorning to defendant as her tenant by accounting to her for half of what it produced. In May, after he had begun this suit, Harrison returned to the place and says of the 8 acres, "this year (1918) I worked that the same as I did mine, it all came together." In that connection he testified to continuous possession under

claim of ownership from the time he selected the 8 acres the year previous. It is pointed out that defendant also testified that after they moved off the place "they still held possession of 8 acres." She also testified that when he came back and went to plowing that land she forbid him doing so, which he denies, with the explanation that he was then plowing on his own 20 acres. Be that as it may, this suit had then been begun and accepting as the testimony of both parties that plaintiffs had continued in unbroken possession of the 8 acres from the time of their first entry as her tenants without having surrendered possession to her, merely continuing their former possession under a different claim of right than the tenancy under which they were let into possession, such continued possession could not in itself constitute an act of part performance.

These parties not only left all their agreements and understandings in regard to the related land deal and lease to rest in parol and are now at hostile variance in certain particulars as to their terms, but in what they subsequently did and said they have so scrambled the whole matter that at the trial the exact line of competent testimony on the issue of specific performance was found by the court to be somewhat obscured under the pleadings which had been filed. Plaintiffs' bill of complaint tells the story as claimed by them including the oral agreement for a five-year lease which they entered upon but were prevented from fully carrying out by her repudiating it and serving notice upon them to quit and surrender up the premises they then occupied, alleging, however, in a separate paragraph that they took possession of the described 8 acres in dispute on May 15, 1917, after notifying defendant of their selection "and have retained actual, open, notorious, hostile and adverse possession thereof since that date."

Defendant's answer traverses plaintiffs' bill paragraph by paragraph according to the approved method of such pleading, admitting, denying and giving her version of the various statements they contain. She denies plaintiffs' allegation of possession of the 8 acres, except such as they took as her tenants; denies any agreement that plaintiffs could select and have this 8 acres, but ratifies in her signed bill the oral agreement as she claims it, entitling them to selection of 8 acres from the other two descriptions, which agreement she is ready and willing to carry out "to the letter"; denies that she ever repudiated the lease as described by plaintiffs, and states she served notice upon them to quit the premises because they failed to fulfill its terms on their part to her great damage, stating some of the particulars in which she claims they failed and she was damaged thereby.

Plaintiffs made general proof of the lease and occupancy under it in harmony with the allegations in the bill, which their counsel stated was to historically advise the court of how they "came to be upon the 52 acres belonging to defendant, working the same on shares." When counsel for defendant on cross-examination of Harrison sought to pursue the subject of the lease farther and show what the agreement was, plaintiffs' counsel objected to that line of evidence as incompetent, had no bearing on the issue they were trying, no relief in that particular being asked and the answer not being in the nature of a cross-bill. On the theory it "may be pertinent to the occupancy of the land," the court allowed the subject of the lease to be gone into at some length but sustained plaintiffs' objections to defendant's broad contention that the chancery court having acquired jurisdiction all issues arising out of the whole transaction should be fully gone into and decided. Amongst other things, defendant was allowed to show against objection that

Harrison was considerably indebted to her in matters arising out of or relating to the lease. This the court conceded, when plaintiffs' counsel objected, was not an issue between the parties under the pleadings but, remarking that it was a chancery case, admitted the testimony "for the purpose of making up a record." To just what extent that matter and some other details shown relating to the lease were proper evidence is perhaps debatable. Plaintiffs' counsel further urge in effect, as we understand it, that the whole line of inquiry into the nature of the lease and what was done under it was improper and should be rejected by this court in trying the case *de novo*. It is true the lease is not directly in issue, nor are the pleadings directed to an accounting between the parties. We think, however, that the admitted testimony has some bearing upon the nature of plaintiffs' possession and on defendant's denial of plaintiffs' charge that she had repudiated the lease without cause. In that aspect and for whatever light it might throw on those questions it was competent; beyond that, issues arising out of the lease itself will be passed without prejudice as outside the pleadings and left undecided.

This record well sustains the conclusion of the trial court that under the circumstances disclosed the occupancy shown prior to commencement of this suit "cannot be said to be actual, open, notorious, hostile or adverse possession of any part of the land."

The decree is affirmed, with costs to defendant.

MOORE, C. J., and BROOKE, FELLOWS, STONE, BIRD, and SHARPE, JJ., concurred.

Justice KUHN took no part in this decision.

PARKS v. SHERMAN.

1. MORTGAGES—TRUST DEED AS SECURITY FOR LOAN NEVER MADE—VALIDITY.

Where a trust deed was executed as security for a loan at a bank, and the bank refused the loan, the deed never took effect, and its assignment by the trustee was without consideration.

2. SUBROGATION—NOT AVAILABLE TO VOLUNTEER.

A principle which lies at the bottom of the doctrine of subrogation is that the person seeking it must have paid the debt under grave necessity to save himself a loss; the right never being accorded to a volunteer.

3. SAME—VOLUNTEER.

Where plaintiff volunteered to pay the debt of a lodge to relieve a member who was holden therefor, expecting that a note signed by several members and secured by a trust deed given by defendant would be accepted by the bank next day, and the money repaid him, but the bank refused to make the loan and the money was never repaid, *held*, that plaintiff had no right of subrogation to the trust deed, since neither plaintiff nor defendant were under obligation to pay the debt, and plaintiff was merely a volunteer.

4. FRAUDS, STATUTE OF—ORAL PROMISE TO PAY DEBT OF ANOTHER.

An oral promise by defendant to plaintiff, made some time afterwards, to reimburse him for money voluntarily paid for the debt of another, *held*, without consideration and void.

5. SUBROGATION—LEGAL AND EQUITABLE RIGHTS OF OTHERS.

Since equity follows the law, the equitable doctrine of subrogation must be applied with due regard to both the legal and equitable rights of others.

Appeal from Berrien; White (Charles E.), J. Submitted October 17, 1919. (Docket No. 65.) Decided February 27, 1920.

Bill by William T. Parks against Arthur Sherman for subrogation to rights under a trust deed. From a decree for plaintiff, defendant appeals. Reversed, and bill dismissed.

Cady & Andrews, for plaintiff.

O'Hara & O'Hara, for defendant.

STEERE, J. This litigation had its origin in the financial delinquences of a fraternal organization which at one time existed in the city of Benton Harbor known as the "Loyal Order of Moose, Lodge No. 879," which went out of existence with its debts unpaid some time prior to the commencement of this suit. Amongst its former active members were plaintiff Parks, defendant Sherman, Charles K. Farmer, A. J. Glennan, H. U. Rapp, and W. E. Marsh who was cashier of the Farmers & Merchants' National Bank of Benton Harbor. Marsh had upon his own responsibility, without submitting the application to the loan committee of his bank, lent the lodge money from the bank's funds. A loan of \$1,000 which he made to the lodge on June 15, 1915, was not paid when due. It was evidenced by two notes of that date to the bank for \$500 each due in six months with interest at 7%, signed by Charles K. Farmer and A. J. Glennan as a board of trustees of said lodge. When they fell due, on December 15, 1915, the lodge defaulted in payment. The officers of the bank notified Marsh that if this unauthorized loan made by him was not paid by December 31, 1915, the amount would be charged up to him and he would be held personally responsible for the same. He was not in financial condition to care for the notes as demanded by the bank and appealed to fellow-members of the lodge to help him out. Farmer, who as a trustee of the lodge had signed the note, called several meetings of certain members of

the order for the purpose of devising some means of taking care of the paper. Plaintiff attended five of them and defendant two or more. Negotiations were had with the cashier of another bank in Benton Harbor for a loan of \$1,000 with which to pay the past due notes which Marsh's bank held him responsible for. The following note which they supposed would be accepted was prepared and signed for that purpose:

"\$1,000.

"BENTON HARBOR, MICHIGAN, December 31, 1915.

"Sixty days after date, I promise to pay to the order of Benton Harbor State Bank \$1,000 (one thousand and no/100 dollars) at Benton Harbor State Bank. Value received. With interest at 7% per annum.

"CHARLES K. FARMER,

"W. T. PARKS,

"W. E. MARSH,

"A. J. GLENNAN,

"H. U. RAPP,

"ARTHUR SHERMAN."

Endorsed on back:

"Protest waived. Loyal Order of Moose Lodge No. 879. Charles K. Farmer, A. J. Glennan, trustees."

The cashier of the Benton Harbor State Bank had, on December 31, assured members of the lodge who made application for the loan that they could borrow the money on this note, but with the qualification that their application had to be taken up by him with the loan committee of the bank at its meeting after closing hours that afternoon. The loan committee, however, disapproved the loan and refused to accept the note. Plaintiff was with Marsh and others in Farmer's office on December 31st, when it was expected the new loan would be consummated, and testified that some members, he did not recall who, went down with the note to the Benton Harbor State Bank to get the money for the purpose of taking it over to the National Bank of which Marsh was cashier, and there

paying the \$1,000 evidenced by the past due lodge notes which he had accepted without authority; that "when they came back they informed Mr. Marsh and the rest of us they could not get the money until the next day at five o'clock"; and "Mr. Marsh almost fainted in his chair there," saying "that money has got to be taken up before 4 o'clock." Plaintiff thereupon, without solicitation of any one so far as shown, went to the National Bank that afternoon and paid up the past due notes over which the trouble had arisen. Of his reason for so doing he says, after telling of Marsh's manifestations of distress:

"That is what gave me the motive for going and taking it up myself, to relieve the strain on Marsh's mind at that time. * * * I took some securities I had, borrowed a thousand dollars and went to the bank and took up the notes under a promise of getting the money from the other bank the next day. That is the reason I paid the notes."

Who then made that promise plaintiff does not disclose. It concededly was not defendant, who was not present and knew nothing of the refusal of the State Bank to approve the loan and accept their note until some time later.

On the date of this rejected note defendant Sherman and his wife executed an instrument called a trust deed to H. U. Rapp covering property described as the north 31 feet of lot 2, block F, Webb's addition to the city of Benton Harbor, and a chattel mortgage for \$1,000 covering the regalia, furniture and other personal property of Lodge No. 879, Loyal Order of Moose, was given Sherman, signed by Farmer, Glenan and Marsh as "trustees," by what authority is not made plain.

The so-called trust deed to Rapp was destroyed in a fire which burned up his store. Secondary evidence was given of its contents and purpose. Sherman tes-

tified that the property it covered was worth \$2,300 upon which there was a mortgage of \$1,100; that at a meeting called to discuss ways and means to take care of this past due indebtedness Parks announced the State Bank would take a note signed as proposed with some additional security, and at Marsh's request he executed the deed to Rapp who had given the brethren quite a talk on their moral obligations; that they told him the deed was wanted as additional security by the Benton Harbor State Bank and Farmer asked him to make it out to Rapp, as trustee, and he accordingly made out the deed to Rapp as security, or collateral, for the note they all signed. Rapp testified that he never talked about the matter with Sherman before he signed the note, which he at first refused to sign, but states he did so later, "after Mr. Farmer came to my office with the deed made out to me as trustee. This deed was made by Mr. Sherman, as security for signing the note. * * * It was clearly set forth to me that Mr. Sherman was becoming solely as guarantor for payment of the note to the subscribers, to the signers." Plaintiff's testimony is that it was given to Rapp "as trustee for the persons named, that signed the note."

It eventuated that plaintiff's fraternal faith was not well founded and his impulsive liberality for the good of the order in general and Marsh in particular left him a victim of misplaced confidence. Unable to get his money back either from the lodge or any of those who had signed the unnegotiated note to the State Bank he, on April 11, 1918, secured from Rapp an assignment of the trust deed of December 31, 1915, which Rapp testified was withheld from record at Sherman's request and destroyed by fire some time before he made the assignment. In the meantime the lodge had faded out of existence and Sherman refused to recognize any legal or moral obligation in the mat-

ter beyond an offer to contribute his proportion of the \$1,000 in connection with the others who signed the note to the State Bank. Actuated as he admits by plaintiff's insistence that he was holden for the whole \$1,000 paid by the former as related, Sherman foolishly deeded the property described in the trust deed to his wife through the medium of a third party, which concededly availed him nothing and so far as of any significance could only serve to his prejudice.

On April 11, 1918, plaintiff filed this bill of complaint, in the nature of a foreclosure bill, to collect the money he had paid the National Bank in taking up the past due note of the lodge, primarily to relieve Marsh as he testified, claiming under the facts alleged that he was subrogated to rights evidenced by the trust deed. The trial court adopted that view and granted the relief asked.

Plaintiff's documentary evidence in this case is the past due notes of the lodge to the National Bank for \$1,000 which he voluntarily paid on December 31, 1915, the rejected note to the Benton Harbor State Bank signed by Farmer, Parks, Marsh, Glennan, Rapp, and Sherman, the chattel mortgage from the lodge to Sherman with an affidavit by the latter of its renewal and the assignment to plaintiff by Rapp of the unrecorded and destroyed trust deed, to which he claims subrogation and the right to foreclose it as a mortgage.

It is undisputed that the note, chattel mortgage and trust deed were prepared and signed with the expectation and for the purpose of borrowing \$1,000 from the Benton Harbor State Bank. That project failed, and different arrangements were made, to which Sherman was not a party, and of which he had no knowledge at the time. He, at Marsh's request, had previously prepared, executed and acknowledged the trust deed and given it to Farmer who turned it

over to Rapp who then signed the note. Plaintiff's claim is that when subsequently informed of what had been done Sherman ratified it. This the latter denies, except as he offered to pay his proportion. Of the transaction when plaintiff parted with the money he now seeks to recover from defendant he testified on cross-examination in part as follows:

"Q. Well, then, your action, taken on the afternoon of December 31st, 1915, when you raised the thousand dollars and went down to the bank and paid the money, was a voluntary action on your part?

"A. Yes, sir.

"Q. The defendant was not a party to it?

"A. No, sir. He was not until the next day. I took the matter up with him and he said it didn't make any difference, he would stand good for it just the same. Next day or day after that.

"Q. Several months afterwards?

"A. Shortly after. I was pretty badly worried there awhile.

"Q. You don't claim that Sherman knew anything about your action before you did it?

"A. No, sir, he didn't know before I did it.

"Q. You did not consult him?

"A. He sanctioned it afterwards; O.K.'d it afterwards.

"Q. You did not consult him?

"A. No.

"Q. He didn't agree you should do it?

"A. No.

"Q. He had no talk with you nor you with him whatsoever, about your paying, personally, a thousand dollars to the Farmers & Merchants Bank?

"A. No."

Of the six members who signed the note only three appeared as witnesses in the case, plaintiff Parks, defendant Sherman, and Rapp. Farmer, Marsh and Glennan, the three leading spirits whose fraternal activities laid the foundation for this trouble, seem to have disappeared and did not testify. Of the pur-

pose of the deed, the three who testified agree that it applied only to the unused note the six signed. Sherman, who prepared and executed it, testified it was given as additional security for the note, meaning that "should all the men who were signers of the note not be collectible, finally it would come to the property," while Rapp testified it was made "as security for signing of the note," and Parks that it was to protect the signers of the note. In 1918, when Parks was pressing Sherman for payment he refused to accept the latter's offer to pay his share, and in explanation states that he said to Sherman, "If you pay me your share and release this deed, I can't get the rest." Adverting to the purpose of the deed as he yet understood it he testified as follows:

"The talks that I had with Sherman were had in 1918, and I asked him at those times what we had better do about it. He had requested us not to record it, consequently we thought nothing more than fair to ask him what we had better do. We thought the proper time had come to record that to protect the signers.

"Q. Protect the signers of what?

"A. Of that note.

"Q. The note that was never used?

"A. Never used. * * *

"Q. How much have those other men paid you that signed this note?

"A. They have not paid anything.

"Q. None of them?

"A. None of them."

Of the chattel mortgage given to Sherman by the trustees of the Moose Lodge to indemnify him in putting up the trust deed, it appears that the property covered by it did not belong to the lodge but to an allied organization called the Moose Club. The authority of the trustees of the lodge to encumber the property of the club for the debts of the lodge was questioned, and so far as any record evidence is pro-

duced their authority to mortgage either lodge or club property is not shown. Parks testified they had such authority and gives the following not altogether lucid reason:

"Because the property of the lodge belonged to the club, Moose Club and not Moose Lodge, consequently, the trustees had power over that at that time, without the sanction of the lodge. That was thoroughly discussed at that time, so as to get it correct. It was organized as the Moose Club."

Sherman testified: "I found it had been given me illegally and didn't amount to anything so I didn't pay any more attention to it at all"; that he never took possession of the property under the chattel mortgage nor sought to foreclose it, and only came into possession of the property of the club as a member of the house committee. Parks testified of this:

"The control of all this loose property was turned over to Mr. Sherman by a house committee composed of Mr. Sherman, Harry Smith and myself. Mr. Sherman then assumed management of the club rooms, directed its operation, appointed its custodian, and took charge of all the funds received and paid out. * * * One reason we turned the management of the Moose Lodge over to Sherman was because nobody else would take it. The lodge was going on the rocks at that time, but that was not the primary reason."

At just what time the management was turned over to Sherman by the house committee is not made clear, but there is evidence that the lodge finally struck the rocks and went out of existence in the fall of 1917. In the meantime the personal property remained in use in the lodge or club rooms as before, except that towards the close some articles were disposed of as need or opportunity arose. The first were some chairs and a pool table sold to a Mr. Newland by authority of the organization at a time when its quarters were

moved from the Newland building into another where rent was lower. Before the lodge went out of existence it several times made payments of interest on the \$1,000 it owed Parks and as late as April 8, 1917, the custodian of the lodge by direction of Sherman paid him \$46.08, which was what they then had in the club treasury. After the lodge was closed Sherman took possession of and sold some of the property in his capacity as house manager as he claimed, keeping account of the proceeds and applying them to the debts of the organization. His story of the closing events is that he received notice from the secretary of the lodge that it had gone out of existence, with directions "to go and get the stock"; that he was also notified by Graham & Morton that there was a month and a half rent due for which he was being held responsible as one of the house committee that made the deal, and in January, 1918, he took possession of the property, which he listed at a valuation of \$325, and says:

"I then paid certain bills of the lodge, including rent. I sent Parks a statement of the property sold, the property on hand, the amount of money owing and a check for the money in my possession, the latter being for \$38.40; I had deducted the actual cash paid out by me."

Of this Parks testified:

"Sherman offered to settle up with me for what money there was left for the goods that were disposed of. He sent me an itemized statement of the goods, of the goods sold, and a check for \$38.40, and notified others that were still owing him for goods, to come and pay me instead of him. He said he was through with it and didn't have anything more to do with it. I sent the check back. He had taken something out of the amount collected for the sale of the furniture for rent paid by him for the lodge."

To what extent Sherman's activities as house man-

ager expedited the lodge's progress towards the rocks may be open to debate, but in considering the equities which plaintiff's counsel emphasize in connection with his claims of subrogation we do not think it made manifest that Sherman availed himself of or personally profited from the chattel mortgage, which he believed was of no validity.

We think it is fairly shown, though not admitted, that at one of the meetings called by Farmer to consider ways and means of relieving Marsh from the jeopardy which confronted him, Sherman expressed himself fervently in favor of aiding Marsh, to whom he felt under obligation for money lent him in time of need, and offered to put up a deed of property having an equity of a thousand dollars to secure the rest in signing a note to the State Bank for that amount. Like several of the other brethren who did even less he seems to have been generous with lip service, but what he actually did was to join in signing a note to the State Bank prepared for that purpose and give the trust deed to Rapp as related. The fact that the bank refused the note lends color to his claim that they wanted and he gave the trust deed as additional security to the bank, but whether it was to secure the bank or the signers of the note is of little moment, for the bank lent the lodge no money and the note was never used. The contemplated debt to the bank for which the note was to be given, secured as to either signers or payee by the trust deed, was never created. This deed in the nature of a mortgage could only take effect as such when the debt to be secured by it was created as a binding contract to pay. When the contemplated loan failed the proposed security for it went into the discard with the failure. Rapp's assignment of the trust deed to Parks was without consideration, and there was no debt to the bank or contingent liability to him or his co-signers of the unused

note in security for which it was given, as the undisputed testimony shows.

There manifestly were no contract relations to convert this trust deed into legal security for plaintiff's voluntary payment of the lodge's debt—a transaction in relation to which Sherman was not consulted, and of which it is conceded he had no knowledge or notice until some time after the event—but plaintiff's counsel also urge on equitable grounds that in the absence of a binding legal contract sufficiently strong equities are shown which should move the chancery court to grant relief by subrogating him “in the place and stead of the signers of the note of the Benton Harbor State Bank”; and particularly emphasize Sherman's subsequent oral ratification, as testified to by plaintiff and others, which Sherman denies as claimed by plaintiff and rather equivocally seeks to qualify; but whatever assurances or promises he may have made to plaintiff related to the debt of another, were oral and without consideration.

Broadly speaking, equity follows the law and the equitable doctrine of subrogation must be applied with due regard to both the legal and equitable rights of others. A bare moral duty or fraternal obligation of the party sought to be charged is not in itself sufficient ground for substitution. The basic infirmity of plaintiff's claim to right of subrogation is that when he paid the notes of the lodge to protect Marsh he was a mere volunteer paying the debt of a third party, for which neither he nor his property nor defendant was answerable, without the knowledge or consent of the party now sought to be charged and in relation to which he himself had no personal interests to protect.

Bouvier's Law Dictionary (8th Ed. 1914), in defining “subrogation” states that “a principle which lies at the bottom of the doctrine is that the person

seeking it must have paid the debt under grave necessity to save himself a loss. The right is never accorded to a volunteer."

This underlying principle is recognized in and applicable to the facts in *Stroh v. O'Hearn*, 176 Mich. 164, cited by plaintiff, and in other Michigan decisions there referred to. In *Palmer v. Sharp*, 112 Mich. 420, it is said, "This is undoubtedly the general rule." In which connection it was noted that the question of who is or is not a mere volunteer is not entirely free from difficulties as illustrated by that class of cases where parties have accepted securities in good faith for loans made to discharge existing incumbrances on real estate, and the securities proving invalid subrogation to the rights of prior lienors has been allowed where no superior equities intervened. No such questions arise here. Plaintiff himself testified he paid the lodge debt voluntarily, and it is undisputed that he neither had nor believed he had any property or personal interests to protect in so doing. He voluntarily paid it to protect Marsh, not himself nor defendant. Under such circumstances a claim for subrogation is not permissible, for the principle which lies at the bottom of the doctrine is wanting.

The decree must be reversed and plaintiff's bill dismissed with costs to defendant.

MOORE, C. J., and BROOKE, FELLOWS, STONE, BIRD, and SHARPE, JJ., concurred.

Justice KUHN took no part in this decision.

INDEX.

ABSENT WITNESS—See NEW TRIAL (10, 11).

ABSTRACTS OF TITLE.

1. In an action against an abstract company for damages growing out of the alleged negligent failure of the defendant, in extending and certifying an abstract, to show a certain incumbrance upon a piece of property plaintiff was about to purchase, testimony on the part of plaintiff, *held*, sufficient to carry the question to the jury as to whether an express contract was made between plaintiff and defendant. *Beckovsky v. Burton Abstract & Title Co.*, 224.
2. In such action, if defendant's agent was advised, when the abstracts were left with him for extension and certification, that the services were to be rendered to plaintiff but were to be paid for by the vendors, and acquiesced therein, it is unimportant whether payment was made or not, there being privity of contract. *Id.* 225.
3. Evidence *held*, insufficient to put plaintiff upon inquiry as to the mortgage in question. *Id.*
4. There is no merit in defendant's contention that plaintiff was not the party who suffered damage because title to the property was taken in the name of his wife, where the declaration charged that plaintiff was the one purchasing the property and a copy of a quitclaim deed from his wife to him was attached thereto and made a part thereof, and the proofs showed conclusively that the entire consideration passed from him to the vendors. *Id.*
5. Where plaintiff, prior to receiving the defective abstracts sued upon, paid certain sums to the vendors on the purchase price, he is not entitled to have those amounts included in his damages, since they were not paid in reliance upon said abstracts. *Id.*
6. The argument of plaintiff that he should recover the full amount paid because after he received the abstracts he parted with the title to his own property, *held*, fallacious, since he received property of an equal value at that time. *Id.*
7. The verdict for plaintiff, *held*, not excessive by the amount of certain notes of the vendors surrendered by plaintiff in reliance upon said abstract as part of the purchase price because soon thereafter said vendors became insolvent, where, so far as the record discloses, the notes at the time of their surrender were good and collectible. *Id.*

(710)

ABUSE OF DISCRETION—See APPEAL AND ERROR (15).

ACCEPTANCE—See DEEDS (5-7).

ACCIDENT INSURANCE—See INSURANCE (7).

ACCOUNTING—See CORPORATIONS (1-4); PARTNERSHIP.

ACQUIESCENCE—See ABSTRACTS OF TITLE (2); INSURANCE (4);
INTOXICATING LIQUORS (2, 3).

ACTION.

The Supreme Court in a former decision (194 Mich. 430) having limited plaintiff's recovery of commissions on renewals of life insurance, under his contract with defendant, to such commissions as had accrued and were payable at the time he started such suit, since the amount was uncertain and could only be determined after the expiration of the period, defendant's contention in this suit for commissions accruing subsequent to the former suit, that plaintiff should have included this demand in the former suit, and that the law will not allow him to split his cause of action into two or more suits, *held*, untenable. *Kyselka v. Northern Assurance Co. of Michigan*, 47.

See ABSTRACTS OF TITLE (1); PRINCIPAL AND SURETY (2).

ACTION AGAINST WRONGDOER—See INSURANCE (5).

ACTUAL PARTIES—See MASTER AND SERVANT (7).

ADEQUATE REMEDY AT LAW—See EQUITY (7).

ADMINISTRATIVE QUESTIONS—See COMMERCE.

ADMISSIONS—See MANDAMUS (2); MASTER AND SERVANT (7).

ADMISSIONS OF AGENT—See EVIDENCE (2, 3).

ADOPTION OF RULE—See CARRIERS (12, 13, 15).

ADVERSE PARTY—See EVIDENCE (4, 5).

AFFIDAVITS—See APPEAL AND ERROR (30); NEW TRIAL (3, 11).

AFFIDAVITS IN SUPPORT OF RETURN—See MANDAMUS (4).

AFFIRMATIVE DEFENSES—See PLEADING.

AGENCY—See PRINCIPAL AND AGENT.

ALIMONY—See DIVORCE (1).

ALLOWANCE OF COSTS BY TRIAL JUDGE—See COSTS (4).

AMBIGUITY—See EVIDENCE (1).

AMENDMENTS—See APPEAL AND ERROR (23); DIVORCE.

AMOUNT OF AWARD—See MASTER AND SERVANT (9).

ANCIENT DOCUMENT—See EVIDENCE (7).

APPEAL AND ERROR.

1. On review of a directed verdict for defendant the Supreme Court will view the testimony in the light most favorable to plaintiff. *Benjamin v. McGraw*, 75.
2. Defendant is foreclosed from claiming in this court that another issue should have been submitted to the jury, where, on the trial, it conceded that the only question for the jury was the one of plaintiff's damages. *Phillips v. Farmers' Mutual Fire Insurance Co. of Kalamazoo County*, 84.
3. Assignments of error based on the admission or exclusion of testimony will not be considered by the Supreme Court, where there was no objection; the error must appear on the face of the record. *People v. Martin*, 109.
4. In reviewing a directed verdict in favor of defendant, the Supreme Court will view the testimony in the light most strongly tending to support the claim of plaintiffs. *Candler v. Heigho*, 115.
5. The charge should be considered as a whole, and the portion objected to should be read and considered in connection with all other portions of the charge given bearing upon the same subject. *Rice v. Michigan R. Co.*, 125.
6. Refusal of the court to give certain requests proffered by defendant, which might well have been given, but which merely stated negative propositions whose force and effect were fairly covered in the charge as given, *held*, not erroneous. *Id.*
7. In an action for breach of marriage promise, where counsel for plaintiff, in his argument as to the measure of damages, said "She is entitled to the same share in his property"—when he was interrupted and the judge stated that he would attempt to define the measure of damages when he got to it, and no complaint is made of the charge of the court thereafter given, there was no reversible error, although counsel finished his remarks as to his understanding of the measure of damages, stating that if he was wrong he would stand corrected. *Gagush v. Hoeft*, 147.
8. Error in limiting the argument of counsel, where prejudice did not result, *held*, not reversible. *Id.* 148.
9. An assignment of error to the charge of the court without pointing out any specific erroneous statement therein, *held*, not sufficiently specific. *Id.*
10. Counsel cannot complain of not having been permitted to comment on contradictory statements of witness on the former trial, where he neglected to call her attention to them when she was on the stand. *Id.*
11. The Supreme Court can only consider the errors which appear on the printed record. *Id.*

APPEAL AND ERROR—Continued.

12. Alleged error in the use of the word "rebuke" by the trial judge when commenting on the contradictory nature of the testimony, where not alluded to in the brief, *held*, not prejudicial in view of the fact that the verdict was less than on the former trial. *Id.* 149.
13. On certiorari to review an order in mandamus proceedings to compel the judge of probate to allow an appeal from the decision in an executor's final account, and to approve an appeal bond, where it appears that said decision was rendered on January 3d and notice of appeal with reasons therefor and an appeal bond were left with the probate court on January 20th, but the surety on said bond did not justify until January 24th, the probate judge not having been requested to nor having fixed the amount of said bond, the appeal was not perfected within 20 days as required by the judicature act (3 Comp. Laws 1915, § 14145), and said order will be reversed. *Flowers v. Wayne Probate Judge*, 199.
14. The probate judge has such an interest in the proceedings as to authorize him to bring certiorari, and the motion to dismiss same is overruled. *Id.* 200.
15. *Held*, under the showing made, that it was an abuse of discretion on the part of the probate judge to refuse an extension of time in which to make an appeal, under 3 Comp. Laws 1915, § 14145. *Id.*
16. A point not raised in the trial court nor covered by an assignment of error will not be considered by this court. *People v. Hassell*, 236.
17. Where the testimony was in dispute, the trial court was not in error in refusing requests to charge which amounted to a directed verdict. *Freeman v. Hoag*, 244.
18. The weight and sufficiency of the evidence, *held*, peculiarly questions of fact for the jury. *Judson v. Pratt*, 287.
19. Where the widow testified that deceased earned \$100 a month, but on cross-examination replied that he worked on commissions, and all she knew was what he told her, it was not reversible error to refuse to strike same, where she further testified that he contributed to the support of herself and child an average of \$60 a month, and the expense of taking care of the child was \$15 a month, in view of the size of the verdict, which was only \$2,500, when compared with a possible estimate on that basis under his and her life expectancy. *Jewell v. Rogers Township*, 319.
20. Where, in a case tried before the court without a jury, there was no request for special findings, no findings made, and no exceptions taken, under Circuit Court Rule No. 45, there is nothing for the Supreme Court to review. *Oscar Daniels Co. v. City of Sault Ste. Marie*, 363.
21. Where no exceptions are taken to any of the findings,

APPEAL AND ERROR—Continued.

and it is not assigned as error, or contended, that the facts found do not support the conclusions of law, assignments of error in the admission and rejection of testimony and the sufficiency of the evidence to support particular findings cannot be reviewed. *Id.*

22. Although the practice in conformity with Circuit Court Rule No. 45 was not followed, where the stipulated facts present a single principal question of law, the Supreme Court may consider the contention made in substance and effect in the assignments of error and argued in the briefs, whether they support the conclusion of law—the judgment. *Id.*
23. Where the director general of railroads, by general order, ordered that all actions at law for loss and damage to property arising under government control should be brought against the director general, and also gave his consent to amendments substituting the director general for the railroad company, and dismissing the company from the action, he cannot be heard to complain if the Supreme Court, under the broad power conferred by the statute of amendments (3 Comp. Laws 1915, § 12478) permits such amendment in this court, and affirms the judgment in favor of plaintiff; there being no defense upon the merits. *Peacock v. Detroit, etc., R. Co.*, 403.
24. The Supreme Court may not, on error, set aside a verdict as excessive by substituting its judgment for that of the jury. *Wilson v. Detroit United Railway*, 411.
25. Defendant's right to appeal from denial of motion to dismiss bill is not absolute, but under 3 Comp. Laws 1915, § 13753, depends upon obtaining an order of a Justice of the Supreme Court to do so. *Carpenter v. Dennison*, 441.
26. Where defendant's motion to dismiss bill to quiet title on jurisdictional grounds was denied and without appealing therefrom he answered, reserving "all right of exception to the said bill of complaint," the question of jurisdiction is not therefor *res judicata*, but is open upon appeal from the decree. *Id.* 442.
27. Where the fact that plaintiff, by undisputed evidence, was entitled to a verdict for the sum of \$28.76 was overlooked by both counsel and court until raised by plaintiffs' counsel on motion for a new trial, a judgment for defendant will not for that reason be set aside and a new trial granted; there having been no assignment of error upon the subject. *Michaels v. Pinten*, 456.
28. That the verdict was less than the evidence would have justified, is a matter of which defendant cannot complain. *O'Dell v. Strath*, 498.
29. It is only where the verdict is clearly against the great weight of the evidence that the Supreme Court will reverse the trial court and grant a new trial. *Id.*

APPEAL AND ERROR—Continued.

30. An affidavit of a witness appended to defendant's brief, that testimony on a certain page of the record "should have read as follows," cannot be considered on appeal. *Schurtz v. City of Grand Rapids*, 510.
31. Where deceased was guilty of contributory negligence, which would bar recovery unless defendant was guilty of gross negligence, the trial court was not in error in excluding evidence of ordinary negligence. *Fhintoff v. Muskegon Traction & Lighting Co.*, 527.
32. Under section 1, Act No. 217, Pub. Acts 1915, if the request for judgment *non obstante veredicto* is denied, an exception in favor of the party making the request follows as a matter of course. *Sherwood v. Babcock*, 536.
33. It was prejudicial error, in an action against a physician for malpractice, for plaintiff's counsel, in his argument to the jury, without any basis therefor, to state that defendant was represented by an attorney for the insurance company. *Id.* 537.
34. In an action for the breach of an oral contract of employment as hotel manager, where the issue, *i. e.*, the terms of the contract, and whether defendant had the right to terminate same on 30 days' notice, was properly submitted to the jury, and decided by them in plaintiff's favor, the submission also of the question as to whether a previous contract made with plaintiff by defendant's manager was binding upon defendant, although immaterial, *held*, not prejudicial to defendant. *Folger v. Addison Apartment Co.*, 607.
35. Although defendant did not appeal within the 20 days prescribed by 3 Comp. Laws 1915, § 13753, where one of the other parties to the proceeding had perfected an appeal pursuant to the provisions of said statute and the rules of the Supreme Court, defendant had the right to appeal under Supreme Court Rule No. 61. *Misner v. Stange*, 680.

See CARRIERS (7, 8); CRIMINAL LAW (12); DIVORCE (1, 2, 4); JUDGMENT (1, 2); LIMITATION OF ACTIONS (2); MASTER AND SERVANT (8, 9); NEW TRIAL (1-4); PRINCIPAL AND SURETY (3); TRIAL (11, 12, 18, 20).

APPEALS—See CIRCUIT COURT COMMISSIONERS.

ARCHITECTS—See TRIAL (19).

ARGUMENT OF COUNSEL—See APPEAL AND ERROR (7, 8, 10, 33); TRIAL (2, 4-7, 11).

ASSAULT AND BATTERY—See CRIMINAL LAW (5).

ASSAULT WITH INTENT TO COMMIT THE CRIME OF RAPE—See CRIMINAL LAW (1, 3, 5).

ASSESSING OFFICERS—See TAXATION (1, 2).

ASSIGNMENTS—See MORTGAGES (2-5); NAMES.

ASSIGNMENTS OF ERROR—See APPEAL AND ERROR (3, 9, 27).

ASSUMED NAME—See NAMES.

ATTACHMENT OF NOTICE OF RULE TO PLEAD—See PROCESS (3).

AUTHORITY TO CLOSE DEAL—See BROKERS (4).

AUTOMOBILES—See NEGLIGENCE (2-4).

BANKS AND BANKING—See MORTGAGES (4); NAMES.

BAPTISMAL CERTIFICATE—See EVIDENCE (7).

BAR TO ACTION—See INTOXICATING LIQUORS (2, 3).

BARRIERS—See HIGHWAYS AND STREETS (1).

BENEFICIAL ASSOCIATIONS—See INSURANCE (3).

BILLS AND NOTES.

In an action on a check given as part of the purchase price of a farm, where plaintiff's testimony failed to make out a case, there being a failure of consideration, a verdict for defendant should have been directed. *Horner v. Townsend*, 612.

See LIMITATION OF ACTIONS.

BONA FIDES—See INTOXICATING LIQUORS (4); MORTGAGES (4).

BONDED INDEBTEDNESS—See SCHOOLS AND SCHOOL DISTRICTS.

BONDS—See PRINCIPAL AND SURETY (1).

BONUS INCLUDED IN NOTE—See USURY.

BOULEVARDS—See MUNICIPAL CORPORATIONS (5).

BREACH OF MARRIAGE PROMISE—See APPEAL AND ERROR (7); TRIAL (3-7).

BROKERS.

1. To entitle a broker to recover for making a loan he was employed to make, but which was not accepted by the principal, it was necessary for him to show that he had produced a person willing, ready, and able to make the loan. *Hendricks v. Cobb*, 595.
2. Proof of statements to plaintiff by a lawyer that he had a client ready to make the loan, *held*, insufficient to prove that plaintiff had a person willing, ready, and able to make the loan. *Id.*
3. Where several brokers were employed to secure a loan, the employer, provided he remains neutral towards the several brokers, is liable for commissions only to the one who first completes the loan, or if he has not delegated

BROKERS—Continued.

authority to conclude the transaction, to the one who first produces a person able, ready, and willing to make the loan on terms agreeable to the employer, and this without any express contract to that effect. *Id.* 596.

4. Where there was some evidence that defendant authorized plaintiff to close the deal for the loan, it was not erroneous for the trial court to express the opinion that, in order to save himself from the danger of being called upon to pay two parties for procuring the loan, defendant should have made such a contract with plaintiff as would have protected defendant, and that at the least he should have informed plaintiff that he was seeking the loan elsewhere and would not be held to pay if he succeeded in getting it before plaintiff did. *Id.*

BUILDING CONTRACT—See EVIDENCE (12); TRIAL (15).

BUILDING RESTRICTIONS—See DEEDS (1).

BULK SALES LAW—See EQUITY (1, 2); FRAUDULENT CONVEYANCES.

BURDEN OF PROOF—See HIGHWAYS AND STREETS (4); LIBEL AND SLANDER (6); MORTGAGES (2); NEGLIGENCE (4).

CANCELLATION OF CONTRACTS—See SALES (5).

CANCELLATION OF INSTRUMENTS—See DEEDS (3).

CARRIERS.

1. In an action for personal injuries, testimony by plaintiff that, intending to take defendant's interurban car, he went upon the platform at the small waiting room, signaled the car to stop, and was answered by a signal by the motorman, advising him that it would stop, that he stood near the edge of the platform expecting the car to stop, when, instead of doing so, it went by at a rate of speed of from 50 to 60 miles an hour, that he was caught in the suction of the car and seriously injured, and by the motorman that no signal nor answer thereto were given, *held*, to present a question of fact for the jury as to defendant's negligence. *Rice v. Michigan R. Co.*, 123.
2. It is the general rule that the relation of carrier and passenger commences when a person with the good-faith intention of taking passage, and with the express or implied consent of the carrier, places himself in a situation to avail himself of the facilities for transportation which the carrier offers. *Id.* 124.
3. An instruction by the court that if the jury believed plaintiff's testimony, it was the duty of defendant in all ways to exercise a very high degree of care for his safety or protection in the operation of its car, *held*, not erroneous. *Id.*

CARRIERS—Continued.

4. Testimony *held*, sufficient to justify a finding by the jury that plaintiff was injured in the manner claimed by him, and that defendant's negligence was the proximate cause of his injury. *Id.*
5. Where plaintiff was in a position of safety when he gave the signal to stop and received the answer thereto, had the car stopped as he had a right to expect it would, and he had but little time after discovering that it was not going to stop before it rushed by, it cannot be said, as a matter of law, that he was guilty of contributory negligence because he failed to step back or because he acted in a manner not afterwards found to be in the interest of his personal safety. *Id.*
6. An instruction by the court that if the jury found that plaintiff stood on the platform with an arm extended so close to the track that the car struck it and caused the accident, plaintiff would be guilty of contributory negligence and could not recover, *held*, to fairly present to the jury defendant's claim as to the cause of plaintiff's injury. *Id.*
7. Where the charge of the court clearly submitted to the jury plaintiff's claim that the negligence complained of was the running of defendant's car past the platform at a high rate of speed after signaling an intention to stop, an objection that plaintiff's action was based on mere failure to stop for a passenger is untenable. *Id.* 125.
8. The giving of plaintiff's requested instruction as to defendant's duty to a passenger, stating a broad proposition of law applicable to such cases, but making no application to the particular facts, while unfortunate, *held*, not prejudicial, in view of the fact that in other portions of the charge the court properly instructed the jury as to the duty defendant owed to plaintiff as an intended passenger. *Id.*
9. In an action against a carrier for failure to furnish sufficient cars to meet plaintiff's normal demands, testimony *held*, to make a case for plaintiff. *Anderson v. Chicago, etc., R. Co.*, 424.
10. If the great demand to furnish cars was sudden, and one the carrier would have no reason to apprehend, and it could not have been reasonably expected, the individual shipper could not insist as an absolute right upon having his requisitions filled. *Id.* 425.
11. In case of car shortage it is the duty of the carrier to allot the cars so as to prevent unjust discrimination. *Id.*
12. Leaving the distribution of cars, in case of a shortage, to the discretion of an officer of the carrier company would not be the adoption of a rule, but if such officer provided a rule of distribution, the rule would be the rule of the company. *Id.*

CARRIERS—Continued.

13. Evidence, *held*, sufficient to justify the conclusion by the jury that a rule for the distribution of cars was adopted by the carrier. *Id.*
14. Evidence that plaintiff was unjustly discriminated against in the nonenforcement of the rule, *held*, sufficient to raise a question for the jury. *Id.*
15. The trial judge was in error in instructing the jury that plaintiff could recover if there was discrimination in fact, taking no account of the question of the adoption of a rule. *Id.*
16. A carrier's duty to furnish sufficient cars to meet the normal demand of the trade is not to be estimated by the number of cars needed when the normal demand is least, but by the number when the normal demand is heaviest, in respect to a seasonal commodity, such as logs. *Id.*
17. The carrier is bound to know that at certain seasons of the year there will be movements of certain seasonal commodities, and is bound to anticipate and provide for such demand. *Id.*

See **COMMERCE**.

CERTIFYING CAUSE TO CIRCUIT COURT—See **JUSTICES OF THE PEACE**.

CERTIORARI—See **APPEAL AND ERROR** (14); **MASTER AND SERVANT** (8, 9).

CHANGE OF TITLE—See **INSURANCE** (1, 2).

CHARGE AS WHOLE—See **APPEAL AND ERROR** (5); **CARRIERS** (8); **CRIMINAL LAW** (8); **TRIAL** (14, 15).

CHECKS—See **BILLS AND NOTES**.

CIRCUIT COURT COMMISSIONERS.

1. The time within which appeals may be taken from circuit court commissioners, being the same as from justices' courts, under 3 Comp. Laws 1915, § 13252, is limited to five days by 3 Comp. Laws 1915, §§ 14402, 14403, 14406, and the circuit court has no discretionary power to allow an appeal after the expiration of that time except where an application is made for a delayed appeal under section 14408. *Feldman v. Zimmerman*, 240.
2. Act No. 243, Pub. Acts 1917, amending 3 Comp. Laws 1915, § 13253, construed, and *held*, not to extend the time from 5 to 30 days within which an appeal might be taken from the judgment of the circuit court commissioner in the case of a proceeding upon an executory contract for the purchase of land, but that the legislative intent was to extend the time within which a writ of restitution might not be issued to 30 days. *Id.*

See **PROCESS** (1).

CIRCUIT COURT RULES—See PROCESS (2).

CIVIL-DAMAGE ACT—See INTOXICATING LIQUORS (1-5).

CLAIM FOR CARE—See ELECTION OF REMEDIES.

"CLEAN HANDS"—See EQUITY (1, 2).

CLOSED HIGHWAY—See HIGHWAYS AND STREETS (1).

COMMENT ON CONTRADICTORY STATEMENTS NOT IN RECORD—See APPEAL AND ERROR (10).

COMMENT ON CONTRADICTORY TESTIMONY GIVEN ON FORMER TRIAL—See TRIAL (7).

COMMERCE.

1. Under the act of congress of February 4, 1887, creating the interstate commerce commission, and amendments (24 U. S. Stat. p. 379 *et seq.*), where questions in interstate commerce arising between shipper and carrier are administrative in character, unless they are first submitted to the interstate commerce commission the courts are without jurisdiction to afford relief. *Anderson v. Chicago, etc., R. Co.*, 424.
2. The question of a railroad's failure to furnish a shipper with sufficient cars for interstate shipments was not one of an administrative character, requiring submission of same to the interstate commerce commission before beginning action therefor in the State court; the Hepburn Act amending the interstate commerce act (34 U. S. Stat. p. 584), requiring the carrier to furnish sufficient cars, being but declaratory of the common law. *Id.*
3. In an action for failure to furnish sufficient cars for interstate shipments, where unjust discrimination is alleged, if such distribution has been made pursuant to a rule of the carrier and in conformity with it, the shipper must first proceed before the interstate commerce commission to establish the discriminatory character of the rule; but if the discrimination was caused by a breach of the rule and resulted from its nonobservance, then the State courts have immediate jurisdiction. *Id.*

COMMISSIONS—See BROKERS.

COMPENSATION, WHEN EARNED—See BROKERS (1).

COMPETENCY OF SERVANT IN CHARGE OF SAWMILL—See MASTER AND SERVANT (1).

COMPROMISE—See NEW TRIAL (3).

COMPROMISE VERDICT—See TRIAL (21).

CONCLUSIONS—See EVIDENCE (17); NEW TRIAL (11).

CONDITIONS AS TO LIGHT—See HIGHWAYS AND STREETS (3).

CONDUCT OF COUNSEL—See TRIAL (3, 12, 20).

CONDUCT OF COURT—See APPEAL AND ERROR (12); TRIAL (9).

CONFLICTING TESTIMONY—See TRIAL (10).

CONSIDERATION—See BILLS AND NOTES; CONTRACTS (1); EQUITY (3, 4); FRAUDS, STATUTE OF (9); MORTGAGES (5).

CONSIGNEE—See INTOXICATING LIQUORS (7).

CONSTITUTIONAL LAW.

The language of the Constitution should receive a strict, but reasonable, construction. *Schurtz v. City of Grand Rapids*, 510.

See MUNICIPAL CORPORATIONS (8, 14).

CONSTRUCTION BY PUBLIC OFFICERS—See STATUTES (4).

CONSTRUCTION OF CONTRACT—See CONTRACTS (2).

CONSTRUCTION OF DEED—See TRUSTS (3).

CONSTRUCTION OF LEASE—See LANDLORD AND TENANT (2, 3).

CONSTRUCTION OF STATUTE—See CIRCUIT COURT COMMISSIONERS (2); STATUTES.

CONTRACTS.

1. The promise of plaintiff to release defendant from his obligation on a contract to pay plaintiff part of the proceeds of a note made by third parties to defendant if he would indorse another note of the makers for \$1,000, thus releasing security in which plaintiff had an interest, *held*, supported by a sufficient consideration. *Freeman v. Hoag*, 244.

2. Where no intention to the contrary appears, general words used after specific terms are to be confined to things *cjusdem generis* with the things previously specified. *Park Building Co. v. George P. Yost Fur Co.*, 349.

See EVIDENCE (12); PRINCIPAL AND SURETY; SPECIFIC PERFORMANCE; TRIAL (19).

CONTRACTUAL RELATIONS—See ABSTRACTS OF TITLE (1).

CONTRADICTORY STATEMENTS—See TRIAL (5).

CONTRIBUTORY CAUSES—See MUNICIPAL CORPORATIONS (3).

CONTRIBUTORY NEGLIGENCE—See APPEAL AND ERROR (31); CARRIERS (5, 6); DEATH; HIGHWAYS AND STREETS (2-5); MASTER AND SERVANT (3, 5); MUNICIPAL CORPORATIONS (2, 4); NEGLIGENCE; RAILROADS (3); STREET RAILWAYS.

CONTRIBUTORY NEGLIGENCE OF DRIVER IMPUTABLE TO PASSENGER IN AUTOMOBILE—See NEGLIGENCE (4).

208—Mich.—46.

CORPORATIONS.

1. Where the president of a corporation acted as its salesman in the sale of its assets to another corporation and received, in addition to the purchase price which the stockholders agreed to accept, \$75,000 in stock of the purchasing corporation, it being understood between himself and the purchaser that he was to keep \$50,000 and turn \$25,000 over to another who assisted in putting the deal through, equity will require that he account to the other stockholders for their proportionate share of the additional stock so received by him; it being apparent that it was in reality part of the purchase price. *Garber v. Town*, 1.
2. Although said president did not personally benefit by the \$25,000 so turned over to another, he had no right to make any such arrangement, and, the stock having passed through his hands, he will be required to account for the same. *Id.*
3. Where the president of a corporation made an arrangement with his board of directors to sell to the corporation the premises occupied by it, taking in payment its stock worth \$30,000, although a few months before he had offered to sell for \$15,000, they will be required to account for the difference in value, in a suit in behalf of the stockholders; transactions between an officer of a corporation and his board of directors being subject to careful scrutiny, and, to be sustained, must have been made in the interest of the corporation. *Id.*
4. The president of a corporation will be required to account to the stockholders for the extra value of shares of its stock issued to him and charged to his account at par, where they were at the time worth double the par value. *Id.* 2.
5. Plaintiff's claim that he was induced to surrender to the corporation certain shares of its stock held by him by reason of the false and fraudulent representations of defendant stockholders, *held*, not sustained by the record. *Bollstrom v. Duplex Power Car Co.*, 15.
6. In equitable proceedings against the secretary of a corporation and certain of its stockholders to recover the difference in value of shares of stock between the amount paid by defendants and the true value, charging that defendant secretary misrepresented the true value, where it appears that plaintiff had always been treated on the books of the corporation as the owner of the stock, and the secretary had so reported a short time before, although plaintiff had been in the habit of transferring same from time to time to persons to whom he was indebted, *held*, that plaintiff was the equitable owner of the stock and entitled to maintain this suit although he was present when the sale of the stock was made and recognized another, to whom he had transferred it as security, as the owner. *Id.*

CORPORATIONS—Continued.

7. Although plaintiff would be estopped from disaffirming the sale of said stock, he is entitled to maintain this suit to recover for the fraud of defendant secretary in misrepresenting its value. *Id.* 16.
8. Testimony reviewed, and *held*, to conclusively establish the fact that at the time of the sale of said stock defendant secretary knew of the completion of a deal whereby the assets of the corporation were to be taken over by another corporation and its stock was to be taken at double its par value in cash or stock of the new corporation. *Id.*
9. Representations by defendant to plaintiff, upon which the latter relied, that he was getting a fair value for his stock, and that he was making a good bargain in selling it at par, although defendant possessed secret information at the time that it was worth double the par value, *held*, to conclusively show that defendant secured said stock by fraud and deception, and that plaintiff was damaged thereby. *Id.*
10. Plaintiff, by this action having affirmed the sale of his stock, would not be entitled to share in the benefits derived by the stockholders at the time of the sale of its assets to another corporation under a decree of the court in another suit. *Id.*

CORRECTING DESCRIPTION OF PREMISES IN DECREE—
See DIVORCE (5).

COSTS.

1. Under 3 Comp. Laws 1915, § 13685, requiring a term fee to be taxed for every term at which a cause is regularly on the calendar, and not reached, or is postponed, if the case is not reached on the call, the term fee is taxable, and if reached, but not tried, by reason of a continuance, a stipulation of the parties, or a lack of time, it is postponed within the meaning of the statute, and the fee is taxable, except where the taxing party has been allowed a continuance fee. *Baxter v. Oakland Circuit Judge*, 600.
2. Under said statute, a term fee is taxed when a case is reached and postponed, although the postponement is at the request of the attorney for the party who finally prevails; for a case is just as clearly postponed if a stipulation is filed the moment the case is reached as it would have been had the stipulation been filed on the first day of the term, and the question at whose suggestion it was postponed can have no influence on the interpretation of the statute. *Id.*
3. The provision for the taxation of a term fee in said statute was created as a service fee for noticing the cause for trial, preparing and delivering a note of issue to the clerk, and afterwards giving the usual attention to cases on the calendar. *Id.*

Costs—Continued.

4. No costs will be allowed against appellant on affirmance, he being a guardian *ad litem* for unknown heirs appointed by the court below, and his compensation and expenses being determined by the trial judge. *Truitt v. City of Battle Creek*, 618.

COURT RULES—See APPEAL AND ERROR (20, 22); PLEADING.

COURTS.

Jurisdiction of the court over the subject-matter may not be acquired by waiver or consent. *Carpenter v. Dennison*, 441.

See COMMERCE.

COVENANTS—See DEEDS (1).

CREATURES OF LEGISLATURE—See MUNICIPAL CORPORATIONS (7).

CREDIBILITY OF WITNESSES—See TRIAL (8).

CRIMINAL LAW.

1. In a prosecution for statutory rape, the defendant may be convicted of rape, of assault with intent to commit the crime of rape, or of simple assault. *People v. Lupa*, 44.
2. In such prosecution, where the trial judge instructed the jury that if they did not find defendant guilty of rape they might find him guilty of assault, and advised them as to what conduct would constitute an assault, but did not advise them that they could convict him of an assault with intent to commit the crime of rape nor as to what conduct would constitute that offense, a conviction thereof will be set aside, on error. *Id.*
3. Failure of the trial court to explain to the jury the distinction between simple assault and assault with intent to commit the crime of rape, *held*, prejudicial. *Id.*
4. In a prosecution for statutory rape, testimony by a police officer that he saw the complaining witness and asked her what the trouble was, but that she did not answer, *held*, not prejudicial. *People v. Martin*, 109.
5. In such prosecution, the trial judge properly instructed the jury as to the lesser offenses, viz., assault with intent to commit rape, and assault and battery, and instructed them that they might convict of either in the event that they did not find defendant guilty of rape. *Id.* 110.
6. Two terms of court having elapsed since the denial of a motion for a new trial, the trial court was without jurisdiction to entertain a motion to set the same aside under 3 Comp. Laws 1915, § 15836. *Id.*
7. In a prosecution for having sexual intercourse with a female by representing it to be beneficial to her health,

CRIMINAL LAW—Continued

while undertaking to treat her medically, in violation of 3 Comp. Laws 1915, § 15505, the charge of the court to the jury that if they believed that the complaining witness consented, as testified to by the defendant, then he should be acquitted, was not open to the objection that the court failed to instruct, in connection therewith, the effect of said testimony in raising a reasonable doubt, where the court fully instructed them, in another part of the charge, as to reasonable doubt, defining the same. *People v. Williams*, 586.

8. The correctness of the charge cannot be tested by taking particular parts, but must be taken as a whole. *Id.*
9. The charge of the court to the jury that they were the sole judges of the facts, and it was for them to determine who was telling the truth, and what inferences should be drawn from the testimony, was not open to the objection that it was too indefinite and uncertain and gave the jury to understand that they were not limited in their inferences as to facts. *Id.*
10. In the absence of any request to charge differently, it was not reversible error, as unduly emphasizing his interest, for the trial court to charge the jury that they should give defendant's testimony the same consideration as the testimony of any other witness, except that they might consider his interest in the outcome of the case. *Id.* 587.
11. Failure to instruct the jury, in a criminal case, as to the presumption of innocence, is not reversible error, where the attention of the court was not called to the omission, and the charge as given was explicit and to the effect that the guilt of the accused must be proved beyond a reasonable doubt. *Id.*
12. Where it cannot be said that omission to charge as to the presumption of innocence resulted in a miscarriage of justice, in view of Act No. 89, Pub. Acts 1915, the case should not be reversed therefor. *Id.*
13. In a prosecution for murder, the admission of testimony by five witnesses that soon after the killing defendant was identified by a colored man as the man who held him up and robbed him a short time before, *held*, reversible error which was not cured by the charge of the court that it was admitted to show the context. *People v. Rafona*, 633.

See INTOXICATING LIQUORS (6, 7).

CROSS-EXAMINATION—See WITNESSES.

CROSSING ACCIDENT—See NEGLIGENCE (1); RAILROADS (3).

CURING ERROR—See DEATH ACT (2); TRIAL (11, 20).

DAMAGES.

1. A verdict for \$13,800, *held*, not excessive on a showing that plaintiff received serious and painful injuries which are permanent, that his usefulness as a physician is impaired, that he will never be able to do any surgical work, that at the time of his injury he was 52 years old, that his income previous to his injury was more than \$300 a month, that he was unable to practice for eight and one-half months, and was confined to bed for eight weeks. *Rice v. Michigan R. Co.*, 126.
2. Where plaintiff, 39 years of age, earning \$91 a month at the time of the injury sued on, was rendered permanently unfit as a wage earner, and the evidence shows that between the time of the injury and the trial he had lost \$2,500 in earnings and that he had suffered greatly during this period, it cannot be said that a verdict for \$6,000 is so grossly excessive that of itself it shows prejudice, passion, or partiality on the part of the jury. *Wilson v. Detroit United Railway*, 411.

See ABSTRACTS OF TITLE (5, 6); APPEAL AND ERROR (19); TRIAL (1).

DEATH.

In an action by a parent, as administrator, brought under the "death act," the contributory negligence of the parents would operate to defeat the action, based upon ordinary negligence. *Flintoff v. Muskegon Traction & Lighting Co.*, 527.

See HIGHWAYS AND STREETS (2-5); MASTER AND SERVANT (1); NEGLIGENCE (4); STREET RAILWAYS (1, 2).

DEATH ACT.

1. Under 3 Comp. Laws 1915, § 14577, it was for the probate court and not the jury to determine the proportion to be distributed to a mother and son of money recovered under the death act in an action for their benefit for the death of the husband and father. *Jewell v. Rogers Township*, 319.
2. Although the foreman of the jury first announced that they had found "for the boy, \$1,500; for the widow, \$1,000; total, \$2,500," the verdict was not therefore illegal, where it was put into legal form by the court, and in answer to an interrogatory as to whether they assessed plaintiff's damages at \$2,500 against both defendants, they all answered "yes." *Id.* 320.

DEBTOR AND CREDITOR—See EQUITY (1, 2); FRAUDULENT CONVEYANCES.

DEDICATION OF PLAT—See EVIDENCE (6).

DEEDS.

1. The erection of a garage for rental purposes on a lot in a residential district restricted to a "single private residence and the necessary outbuildings" is in violation of such restriction, and was properly enjoined by the court below. *Smith v. Byrne*, 104.
2. The finding of the court below that defendants' contention that plaintiffs were aware of defendants' purpose in erecting said garage building was not supported by a preponderance of the evidence, *held*, justified by the record. *Id.*
3. Allegations in a bill to set aside a deed and for an accounting for personal property given to defendants in consideration of their furnishing to plaintiff, who was 68 years old, alone in the world, sick and unable to help himself, his board, clothing, medical attendance, etc., for life, on the ground that same were obtained by duress, undue influence, etc., *held*, not supported by a preponderance of the testimony. *McQuinn v. Running*, 207.
4. The determination of the question of the effect of the giving of a certain life estate, being unnecessary to a decision of the case, what was said in the former opinion thereon is withdrawn on rehearing. *Truitt v. City of Battle Creek*, 618.
5. Since no one can be compelled to accept, by gift, title to land, where one does not accept title attempted to be given him, but renounces it, he may buy the premises as any other stranger to the title may do. *Id.*
6. The presumption that plaintiff accepted a gift deed of land may be rebutted by proof. *Id.*
7. Evidence *held*, conclusive that plaintiff did not accept a gift deed of land, but renounced it. *Id.*

See EVIDENCE (6); INSURANCE (2); TRUSTS.

DEFAULT—See PROCESS (2); SALES (5, 6); WAIVER (2).

DEFECTIVE ABSTRACT—See ABSTRACTS OF TITLE (1, 3).

DEFENDANT'S INTEREST—See CRIMINAL LAW (10).

DEFENSES—See INTOXICATING LIQUORS (4).

DELEGATED POWERS—See MUNICIPAL CORPORATIONS (9, 11).

DELIVERY—See INSURANCE (2); SALES.

DELIVERY TO CARRIER—See SALES (1).

DENIAL OF MOTION TO DISMISS—See APPEAL AND ERROR (25, 26).

DERIVED POWERS—See MUNICIPAL CORPORATIONS (7).

DESCRIPTION OF PREMISES BY STREET NUMBER—See LANDLORD AND TENANT (5).

DILIGENCE—See **NEW TRIAL** (7).

DIRECTED VERDICT—See **APPEAL AND ERROR** (1, 4, 17); **BILLS AND NOTES**; **FRAUD** (2); **LIBEL AND SLANDER** (8); **STREET RAILWAYS** (1).

DISAGREEMENT OF JURY—See **JUDGMENT NON OBSTANTE VERDICTO**; **TRIAL** (22).

DISCHARGE OF MORAL DUTY—See **LIBEL AND SLANDER** (3).

DISCHARGE OF MORTGAGE—See **MORTGAGES** (1).

DISCOVERED NEGLIGENCE—See **STREET RAILWAYS** (4).

DISCRETION OF COURT—See **DIVORCE** (2, 3); **SPECIFIC PERFORMANCE** (1).

DISMISSAL AND NONSUIT.

1. Demurrers, pleas in abatement, and pleas to the jurisdiction having been abolished by 3 Comp. Laws 1915, § 12456, their function is now performed by a motion to dismiss, but it does not perform the function of a plea in bar, and defenses which formerly required a plea in bar cannot be made under the summary proceeding of a motion to dismiss. *Vyse v. Richards*, 383.
2. The defense of the statute of limitations, being a bar to the action, must be pleaded in order to be available, and cannot be raised by a motion to dismiss in the nature of a demurrer. *Id.*
3. The defense of former adjudication, or *res judicata*, must be pleaded in bar and cannot be raised by motion to dismiss. *Id.*

DISTRIBUTION OF CARS—See **CARRIERS** (9-17).

DISTRIBUTION TO WIDOW AND CHILD OF MONEY RECOVERED UNDER DEATH ACT—See **DEATH ACT** (1).

DIVORCE.

1. Except as modified by 3 Comp. Laws 1915, § 11408, it is the rule in this State that a decree for permanent alimony containing no reservation of the power of modification cannot be altered after the expiration of the time within which an appeal may be perfected. *Gundick v. Gundick*, 34.
2. Where the court below, on motion of the husband, after expiration of the time for perfecting an appeal, modified the decree for alimony by changing the wife's undivided interest in the homestead to a money interest, which action has no justification on the record under said statute, it was without authority and will be set aside by the appellate court. *Id.*
3. Even if the court had authority to amend the decree, *held*, that, on the uncontroverted showing made by the wife, on her motion to set it aside, the failure of the

DIVORCE—Continued.

court to do so clearly amounted to an abuse of discretion.
Id. 35.

4. An order denying defendant's motion to set aside an amended decree, being one finally disposing of the controversy, is appealable. *Id.*
5. The court below, having power to amend the decree by correcting the description of the premises therein, that part of the decree so amending said description will be affirmed. *Id.*

DUTY OF CARRIER—See CARRIERS (3, 11).

DUTY TO FURNISH CARS FOR SEASONAL COMMODITIES—
See CARRIERS (16, 17).

DUTY TO FURNISH CARS NOT MEASURED BY SUDDEN DEMAND—See CARRIERS (10).

DUTY TO GUEST—See MOTOR VEHICLES (2, 3).

DUTY TO INTENDED PASSENGER—See CARRIERS (1).

EJECTMENT—See QUIETING TITLE; TAXATION (5).

ELECTION OF REMEDIES.

Although plaintiff was authorized by the supervisor of the township to care for an aged and infirm man, who was without relatives to care for him, until his death, where she presented her claim for same against the estate of deceased, and the commissioners on claims allowed it in part, presumably determining that the amount allowed was all she was entitled to, she elected her remedy, and could not thereafter maintain an action against the township for the balance of her claim. *Briggs v. Township of Ronald*, 603.

ELEMENTS OF ACTION—See FRAUD (1).

EQUITABLE OWNER OF STOCK ENTITLED TO MAINTAIN SUIT FOR FRAUD IN SALE—See CORPORATIONS (6).

EQUITY.

1. Where the sale of a stock of goods sold in violation of the "Bulk Sales Law" failed by reason of the same being taken to satisfy the creditors, the seller could not hide behind the statute and thus avoid liability to the buyer, and the court of equity will not permit the seller in such case to retain the purchase price; the doctrine of "clean hands" having no application. *Krolík v. Kaczmarek*, 378.
2. In a suit to rescind, on the ground of fraud and failure of consideration, a contract for an exchange of plaintiff's farm for a stock of goods and other property belonging to defendant, without complying with the "bulk sales law," the doctrine of "clean hands" has no application, the

EQUITY—Continued.

rights of creditors not being affected. *Aldright v. Stockhill*, 468.

3. Mere inadequacy of consideration, unless it is so gross as to shock the conscience of a chancellor, is not itself a ground on which a contract will be rescinded, and where the consideration failed in part, damages may be awarded to the amount plaintiff is damaged, instead of the contract being rescinded. *Id.*
4. Where the consideration is so grossly inadequate as to shock the conscience, courts will interfere, although there has been some exercise of judgment by the parties fixing it. *Id.*
5. Where, in exchange for plaintiff's farm, defendant put in as part of the consideration therefor a stock of goods without complying with the "bulk sales law," and without revealing to plaintiff the fact that creditors' claims equaled the value thereof, and to the extent of such value the consideration failed, whether the withholding of such information was intentional or due simply to ignorance of the law, there was such failure of consideration, amounting to gross inadequacy of consideration, as calls upon a court of equity to grant relief. *Id.* 469.
6. Although at the time plaintiff filed his bill he was not in position to ask rescission, equity will retain jurisdiction and grant such relief in damages as he is entitled to. *Id.*
7. The mere fact that the person defrauded might have a remedy at law would not deprive him from coming into a court of chancery and having the agreed consideration, or the value of the premises, declared to be an equitable lien upon the lands. *Id.*

See SPECIFIC PERFORMANCE (2); SUBROGATION (3); TAXATION (5).

EQUITY JURISDICTION—See QUIETING TITLE.

ERRORS APPEARING IN RECORD—See APPEAL AND ERROR (11).

ESCHEATED ESTATES.

Under 1 Comp. Laws 1915, § 329, if any person shall disappear and his whereabouts remain unknown for the space of seven years, etc., he shall be presumed to be dead. *Woolfitt v. Histed*, 308.

ESTATES—See FRAUDS, STATUTE OF (4).

ESTATES OF DECEDENTS—See ELECTION OF REMEDIES.

ESTOPPEL—See APPEAL AND ERROR (2); CORPORATIONS (7); DEEDS (2); INSURANCE (4); MASTER AND SERVANT (7-9); MUNICIPAL CORPORATIONS (6); TAXATION (6).

EVIDENCE.

1. Oral testimony, *held*, admissible to show the intent of the parties to a subcontract in writing, where uncertainty existed as to whether a certain item of work specified in the original contract was covered by the subcontract; the latter referring to the original contract, incorporating part thereof, but omitting other important parts. *People, for Use of Ryan, v. Boyes*, 58.
2. The declarations of an agent as to a past transaction are inadmissible to bind the principal. *Jonescu v. Orkch*, 89.
3. In an action against the employer for the death of plaintiff's decedent caused by a fall through a skylight while he was at work on a roof, admissions on the way to the hospital by defendant's brother, who was in charge of the work as foreman, that he forgot to tell decedent about the skylight, which was covered with snow, *held*, inadmissible as after the fact. *Id.*
4. Under 3 Comp. Laws 1915, § 12554, on plaintiff's theory that defendant's brother was his agent, the brother might have been called and questioned as to his knowledge of the existence of the skylight and that it was concealed by snow. *Id.* 90.
5. While the representative of the deceased waived the privilege of the statute (3 Comp. Laws 1915, § 12553) prohibiting a party adverse in interest from testifying as to facts equally within the knowledge of the deceased, and compelled defendant to testify under 3 Comp. Laws 1915, § 12554, as to the contract of hiring, the door she thus opened to a further examination of defendant was confined to said contract, and a question by his counsel as to whether he called deceased's attention to the skylight, being no part of the contract of employment, was inadmissible. *Id.*
6. Testimony by one of the stockholders of a corporation owning a plat that, in dedicating the same to the city, a boulevard shown therein was offered as a boulevard and not as an ordinary street, and that the same was accepted as such, *held*, admissible. *MacLachlan v. City of Detroit*, 188.
7. In ejectment, where the question of defendant's pedigree was involved, a certificate of baptism issued by a church according to its custom and kept by the alleged parents in the family bible until their death, is admissible, where verified by an eyewitness to the baptism, and its weight is for the jury, although it is not a church record, nor, in a legal sense, an ancient document implying an age of over 30 years. *Livernash v. DeLorme*, 295.
8. Proof of statements and admissions of the alleged parents that defendant was their child, *held*, admissible. *Id.*
9. Testimony of a witness that she knew that the alleged mother of defendant was not her mother, where full of

EVIDENCE—Continued.

- inconsistencies and contradicted by other witnesses, *held*, not such positive testimony as to exclude secondary evidence, and its weight was properly for the jury. *Id.*
10. Statements of the alleged mother as to the birth of defendant, made about the time she was born, the mother now being dead, *held*, admissible. *Id.*
 11. The courts of this State take judicial notice of the acts of Congress, and the proclamations of the President. *Peacock v. Detroit, etc., R. Co.*, 403.
 12. In an action to recover a balance claimed to be due on a building contract, where the amount of the contract was in dispute, testimony as to the amount of work and labor furnished gratuitously by the plaintiff was properly rejected, being irrelevant and immaterial to the issue. *Michaels v. Pinten*, 455.
 13. The Supreme Court will take judicial notice of the fact that the trial took place in the immediate vicinity of the home office of a building and loan association. *Id.* 456.
 14. In a suit by a taxpayer to restrain a city from acquiring a public utility without an affirmative three-fifths vote of the electors, voting thereon, testimony of "talk" in the common council was incompetent and cannot be considered in view of the record proceedings. *Schurtz v. City of Grand Rapids*, 510.
 15. Where plaintiff offered in evidence the original record of a resolution of the common council, he could not later contradict it by offering a corrected published copy, since the original record must control. *Flintoff v. Muskegon Traction & Lighting Co.*, 527.
 16. The intent of the parties to a written lease is to be found by an examination of the lease, and parol evidence of the understanding of the parties is inadmissible to vary its terms. *Meredith v. McCormick*, 563.
 17. Plaintiff's assertion that they took exclusive possession as owners of a strip of land is but a conclusion not borne out by their own testimony, which shows that they took it with other land under an oral lease. *Harrison v. Easom*, 685.

See ABSTRACTS OF TITLE (3); APPEAL AND ERROR (3, 4, 21); CARRIERS (4, 9, 13); CORPORATIONS (8); CRIMINAL LAW (4, 13); DEEDS (3, 7); FIXTURES; FRAUD (4); FRAUDS, STATUTE OF (7, 8); INSURANCE (7); INTOXICATING LIQUORS (5); JOINT ADVENTURES; JUDGMENT (3); LIBEL AND SLANDER (7); LIMITATION OF ACTIONS; MASTER AND SERVANT (5, 6); MORTGAGES (1); MOTOR VEHICLES (1); NEGLIGENCE (3); NEW TRIAL (2); PARTNERSHIP; RELEASE; STREET RAILWAYS (4); TAXATION (2); TRIAL (12, 17, 19).

EXCEPTION AS MATTER OF COURSE—See APPEAL AND ERROR (32).

EXCEPTIONS, NECESSITY FOR—See **APPEAL AND ERROR** (20, 21).

EXCESSIVE DAMAGES—See **ABSTRACTS OF TITLE** (7).

EXCESSIVE VERDICT—See **APPEAL AND ERROR** (24); **DAMAGES**.

EXPRESS CONTRACT—See **ABSTRACTS OF TITLE** (1).

EXTENSION OF TIME FOR APPEAL—See **APPEAL AND ERROR** (15).

EXTRINSIC EVIDENCE—See **LIBEL AND SLANDER** (7).

FAILURE OF CONSIDERATION—See **EQUITY** (7).

FAILURE TO FURNISH CARS—See **CARRIERS** (9-17); **COMMERCE** (2, 3).

FALSE REPRESENTATIONS—See **CORPORATIONS** (10).

FEDERAL INCOME TAX—See **LANDLORD AND TENANT** (4)

FEDERAL INCOME TAX UPON RENTALS NOT A TAX UPON THE PROPERTY—See **TAXATION** (3).

FEDERAL TERRITORY—See **STATES**.

FIDUCIARY RELATIONS—See **CORPORATIONS** (1, 2).

FINAL ORDER—See **DIVORCE** (4).

FIRE INSURANCE—See **INSURANCE** (1, 2, 5, 6).

FIXTURES.

1. In replevin to recover possession of certain garage tools and machinery claimed by plaintiff to be fixtures and to have passed to him by deed from defendant mortgagor to save foreclosure of real estate mortgage, testimony that the articles were not permanently attached to the real estate, that they could be, and were, removed without injury to the building, that they were installed by defendant for the purpose of carrying on his trade with no intent to make them permanent fixtures, that they were not specially designed for use in this particular building but were adapted for use in any building, *held*, admissible and for the consideration of the jury as to whether they were fixtures. *Morris v. Alexander*, 387.

2. While in some cases the court may take judicial notice that articles are so attached as to become a part of the realty, it cannot be said upon this record, as matter of law, that the articles here involved are fixtures, and the trial court properly submitted the case to the jury. *Id.*

FORECLOSURE—See **MORTGAGES** (2, 4); **NAMES**.

FORFEITURE—See **INSURANCE** (3, 4); **TRIAL** (14).

FRAUD.

1. In order to make misrepresentation actionable, there must be a reliance upon the representation. *Candler v. Heigho*, 115.
2. Although defendants, officers and stockholders of a corporation, misrepresented to the administrator of an estate the value of certain shares of the stock of the corporation inherited by plaintiffs, and bought it for much less than its book value, such misrepresentation was not actionable where the proofs conclusively show that the administrator fully investigated and placed before plaintiffs the facts as to its book value before the sale, and no reliance was placed upon such misrepresentation. *Id.*
3. Mere expressions of matters of opinion as to values, upon which men might fairly and honestly differ, cannot be made the basis of fraudulent representations. *Abright v. Stockhill*, 469.
4. In a suit to rescind a contract whereby plaintiff received, in exchange for his farm, among other property, an electric light plant, testimony in support of plaintiff's claims of fraudulent representations as to cost of operating and income from same, held, insufficient to sustain the burden of proof. *Id.*

See CORPORATIONS (5, 7-9); EQUITY (2, 5, 7); FRAUDULENT CONVEYANCES (3); MORTGAGES (2, 4); SPECIFIC PERFORMANCE (2); TAXATION (1, 2).

FRAUDS, STATUTE OF.

1. Under the statute of frauds (3 Comp. Laws 1915, § 11981), an oral lease of lands could not extend beyond one year. *Harrison v. Eassom*, 685.
2. An oral agreement for the conveyance of land is void under the statute of frauds (3 Comp. Laws 1915, § 11981). *Id.*
3. A void contract for the sale of lands is sometimes said to be made valid by acts in part performance. *Id.*
4. Where plaintiffs and defendant orally agreed to work certain land together, including eight acres which was to go to plaintiffs, selection of which had not yet been made, their possession was concurrent, and plaintiffs could not acquire a new or different estate under an oral contract to work all the land and give defendant a share. *Id.*
5. Taking possession under an oral contract must, to become an element of part performance, be exclusive, open, and notorious, under a claim of ownership. *Id.* 686.
6. Where plaintiffs went into possession of land as defendant's tenants, and continued in unbroken possession from the time of entry without having surrendered possession, merely continuing their possession under a different claim of right than the tenancy under which they were let in

FRAUDS, STATUTE OF—Continued.

could not in itself constitute an act of part performance of an oral contract to convey. *Id.*

7. In proceedings for the specific performance of an oral contract to convey a strip of land, while an oral lease involving the premises in dispute, and as to the amount plaintiffs owed defendant thereunder, were not directly in issue, evidence in relation thereto was competent for whatever light it might throw upon the nature of plaintiffs' possession and the termination of the lease. *Id.*
8. The conclusion of the court below that, under the circumstances disclosed, the occupancy shown prior to the commencement of this suit "cannot be said to be actual, open, notorious, hostile, or adverse possession of any part of the land," entitling plaintiffs to specific performance of an oral contract to convey, *held*, sustained by the record. *Id.*
9. An oral promise by defendant to plaintiff, made some time afterwards, to reimburse him for money voluntarily paid for the debt of another, *held*, without consideration and void. *Parks v. Sherman*, 697.

See SPECIFIC PERFORMANCE (2); TAXATION (6); TRUSTS (4).

FRAUDULENT CONVEYANCES.

1. The purpose of the "bulk sales law" (2 Comp. Laws 1915, §§ 6346-6348) being to protect creditors, a sale made in violation thereof is void only as to creditors; being valid as between the seller and buyer. *Krolik v. Kaczmarek*, 378.
2. The "bulk sales law" (2 Comp. Laws 1915, § 6346 *et seq.*) was enacted for the purpose of preventing fraud by debtors upon creditors, and a sale made in violation thereof is void only as to creditors, and is valid between the seller and buyer. *Albright v. Stockhill*, 468.
3. If in a sale made in violation of the "bulk sales law" the seller has been guilty of any fraud to the injury of the buyer, or if there has been a grossly inadequate consideration, the seller cannot hide behind the statute and thus avoid liability to the buyer. *Id.*
4. No contract of sale valid as to creditors of the seller can be entered into unless the requirements of the "bulk sales law" are complied with. *Id.*

See EQUITY (1).

GARAGE—See DEEDS (1).

GAS.

A gas company derives its right to make and sell gas, not from the city, but from the State. *City of Kalamazoo v. Titus*, 253.

GAS RATES—See MUNICIPAL CORPORATIONS (12).

GENERAL ACT INCONSISTENT WITH LOCAL—See STATUTES (3).

GENERAL SCHOOL LAWS SUPERSEDE LOCAL ACT—See SCHOOLS AND SCHOOL DISTRICTS.

GENERAL WORDS AFTER SPECIFIC—See CONTRACTS (2).

GIFTS—See DEEDS (5-7).

GOOD FAITH—See INTOXICATING LIQUORS (4); MORTGAGES (4).

GRAND RAPIDS CHARTER—See MUNICIPAL CORPORATIONS (13-15).

GRATUITOUS WORK—See EVIDENCE (12); MOTOR VEHICLES (2, 3).

GREAT WEIGHT OF EVIDENCE—See APPEAL AND ERROR (29).

GROSS INADEQUACY OF CONSIDERATION—See EQUITY (3-5).

GROSS NEGLIGENCE—See STREET RAILWAYS (4).

GUARDIAN AD LITEM—See COSTS (4).

GUEST—See MOTOR VEHICLES (2, 3).

HARMLESS ERROR—See APPEAL AND ERROR (19, 31, 34); CRIMINAL LAW (4); TRIAL (12).

HEARSAY—See CRIMINAL LAW (4).

HIGHWAYS AND STREETS.

1. After having laid out, opened, improved, and maintained a road as a public highway for many years, it was the duty of the township and a quarry company which it permitted to destroy the same by extending its quarry across it, to effectually exclude public travel by barriers from that particular portion made impassable. *Jewell v. Rogers Township*, 318.
2. In an action against a township and a quarry company for the death of plaintiff's intestate, a passenger in an automobile which ran into an excavation across a closed public highway, where there was evidence that deceased and the driver had been drinking beer in a saloon a short time before the accident, the question as to what extent they were under the influence of liquor, *held*, for the jury under proper instructions. *Id.*
3. In such case, where there was some conflict in the evidence as to the exact time the accident occurred, and whether it was then getting dusk, the question as to what extent the approach of night or evening shadows might affect the clear view of one driving along the highway, *held*, for the jury. *Id.* 319.
4. In order to recover it was necessary for plaintiff to show that deceased was free from contributory negligence. *Id.*

HIGHWAYS AND STREETS—Continued.

5. In such action, where the testimony was very conflicting, the trial court properly held that the question of deceased's contributory negligence was for the jury. *Id.*

See MUNICIPAL CORPORATIONS (1-6); NEGLIGENCE (1-3).

"HOME-RULE ACT"—See MUNICIPAL CORPORATIONS (11, 12, 14).

ILLEGAL SALES—See INTOXICATING LIQUORS (1-5).

IMMATERIAL ISSUE—See APPEAL AND ERROR (34).

IMPEACHMENT—See NEW TRIAL (7); RELEASE.

IMPLICATIONS—See STATUTES (2).

IMPUTABLE NEGLIGENCE—See MUNICIPAL CORPORATIONS (4).

INDORSEE OF NOTE EQUITABLE OWNER OF MORTGAGE
—See MORTGAGES (3).

INDORSEMENTS ON NOTES—See LIMITATION OF ACTIONS.

INFANTS—See DEATH; STREET RAILWAYS (2).

INFERENCES—See INTOXICATING LIQUORS (2, 3).

INFERENCES FROM FACTS—See CRIMINAL LAW (9).

INFERRED POWERS—See MUNICIPAL CORPORATIONS (11).

INJUNCTION—See DEEDS (1); LANDLORD AND TENANT '8): TAX-
ATION (5).

INSTRUCTIONS—See APPEAL AND ERROR (5-7, 9); CARRIERS (3,
6-8, 15); CRIMINAL LAW (2, 3, 5, 7-12); INTOXICATING LIQUORS
(1, 2, 5); MUNICIPAL CORPORATIONS (3); TRIAL (1-3, 8-11, 13-16,
18).

INSURANCE.

1. The risk assumed by a mutual fire insurance company on plaintiff's property was not terminated by a deed and assignment of a land contract of sale of the same by her to a broker for the purpose of securing a purchaser and with no intention of conveyance to him, although a clause in the policy provided that any change in the title of the property should terminate the risk. *Phillips v. Farmers' Mutual Fire Insurance Co. of Kalamazoo County*, 84.
2. There being no intention of presently passing the title to the broker, there was no such delivery as conveyed a present interest in the property. *Id.*
3. A mutual benefit association may not declare a forfeiture of the policy of insurance where it has in its hands money belonging to the policyholder sufficient to pay and discharge the dues and assessments when due and payable. *Olifford v. Catholic Mutual Benefit Ass'n*, 448.

208—Mich.—47.

INSURANCE—Continued.

4. Nor may it invoke the doctrine of acquiescence and estoppel to work a forfeiture of the policy of insurance where it has in its hands money it has unlawfully exacted sufficient to make all payments due upon the policy, even though considerable time has elapsed since the unlawful exaction. *Id.*
5. Where insured has sustained a loss, he is not required to invite the insurer to take part in an action against the wrongdoer, nor to take any special steps to protect the insurer; but it is the insurer's privilege to intervene and protect his own rights, if he sees fit to do so, under 3 Comp. Laws 1915, § 12362. *Washtenaw Mutual Fire Ins. Co. v. Budd*, 483.
6. Where the total amount received by the insured from the insurer and the wrongdoer, after deducting attorney's fees and costs, did not exceed the value of the property destroyed, the insurer was not entitled to subrogation against the insured to the judgment recovered against the wrongdoer, although the policy was a valued policy, it appearing by its terms that the insurance was only two-thirds of the estimated value. *Id.*
7. In an action on an accident policy, on the issue as to whether insured's death was the result of an accident within the terms of his policy, evidence held, by a divided court, sufficient to take the question to the jury. *Abbott v. Travelers Insurance Co.*, 654; *Abbott v. Fidelity & Casualty Co.*, 679.

See ACTION; TRIAL (14).

INTENDED PASSENGER—See CARRIERS (1-8).

INTENT—See DEEDS (2); FIXTURES (1); INSURANCE (2); TRUSTS (3); WAIVER (1).

INTEREST—See USURY.

INTEREST OF PROBATE JUDGE—See APPEAL AND ERROR (14).

INTERPRETATION OF STATUTE—See INTOXICATING LIQUORS (6, 7).

INTERSTATE COMMERCE—See COMMERCE.

INTOXICATING LIQUORS.

1. In an action against a saloon keeper and his bondsman for an illegal sale of liquor to plaintiff's minor son, where defendant saloon keeper admitted that part of the liquor was drunk when plaintiff stepped around the partition to the bar, and denounced the sale, an instruction to the jury that plaintiff was so near to said minor son at the time that he could have prevented his drinking the liquor, but did not do so, held, erroneous and prejudicial. *Battle v. Roth*, 173.

INTOXICATING LIQUORS—Continued.

2. Where there was nothing in the record from which an inference could be drawn that plaintiff acquiesced in the furnishing of liquor to his minor son, an instruction to the jury that plaintiff could not recover for an illegal sale of liquor that he acquiesced in, was erroneous. *Id.*
3. Where the minor son had drunk part of the glass of liquor before plaintiff entered the bar, he was under no obligation to snatch the glass from his son's hand, and his failure to do so cannot be construed as acquiescence in the illegal sale. *Id.*
4. Under the provisions of the act (2 Comp. Laws 1915, § 7050), the good faith of the defendant in selling the liquor to a minor is no defense, and while it might have been considered by the jury in its award of damages, it was error for the trial court to submit it as a fact which, with others, would bar recovery. *Id.*
5. The trial court was in error in submitting to the jury testimony of defendant that he had had trouble with an older brother of the minor who was with him when the illegal sale was made, as tending to furnish a motive on the part of plaintiff for prosecuting the action, since there is nothing in the record to show that plaintiff knew of the incident. *Id.*
6. The provisions of the statute (section 38, Act No. 338, Pub. Acts 1917) requiring the labeling of liquor in transit apply to all shipments of liquor by common carriers. *People v. Hassell*, 236.
7. In a prosecution for an offense under section 38, Act No. 338, Pub. Acts 1917, making it unlawful for any consignee of intoxicating liquors to receive or have in his possession any original package or packages containing intoxicating liquor unless said package is marked, etc., where defendant, a passenger, checked two trunks containing whisky of 44.48 per cent. alcoholic content, not marked in compliance with the statute, and at destination gave a drayman the checks, who obtained the trunks and transferred them to another depot, defendant was guilty of the offense, he being both consignor and consignee, and the possession of the drayman was the possession of defendant. *Id.*

INTOXICATION AS CONTRIBUTORY CAUSE—See HIGHWAYS AND STREETS (2).

INTRINSIC EVIDENCE—See LABEL AND SLANDER (7).

ISSUES FORMED BY PLEA TO RETURN—See MANDAMUS (2).

ISSUES RAISED—See JUDGMENT (1).

JOINING SEPARATE CLAIMS—See PRINCIPAL AND SURETY (2).

JOINT ADVENTURES.

Where plaintiff real estate employee had obtained an option on 30 acres of land in his own name, and, being unable to finance same, sold a one-half interest to his employer, who negotiated a sale thereof to a real estate company and was by it appointed a sales manager, plaintiff's claim against his former employer that he was to receive a share of the profits realized as commissions on sales, *held*, not sustained by a preponderance of the evidence. *O'Connor v. Scallen*, 417.

JUDGMENT.

1. Where plaintiffs appealed to the Supreme Court from the decision of the chancellor on several distinct issues adjudicated by him, they were entitled to the judgment of this court upon each question raised. *Spitzley v. Garrison*, 50.
2. Where the decision of the Supreme Court was expressly confined to one of the questions raised, and plaintiffs moved for a rehearing, challenging the court's attention to the undetermined questions, and the rehearing was denied, *held*, that such denial must be construed as settling said questions adversely to plaintiffs. *Id.*
3. In an action against a physician for malpractice, evidence of plaintiff in support of his theory that a child in his family, treated by defendant for pneumonia, died of cerebro-spinal meningitis and that other children in the family were exposed and thereby became afflicted therewith, while defendant treated them for typhoid fever, *held*, insufficient, and that a motion for a directed verdict *non obstante veredicto* should have been granted. *Sherwood v. Babcock*, 536.
4. Under section 2, Act No. 217, Pub. Acts 1915, where the Supreme Court finds that the trial court was in error in not entering judgment *non obstante veredicto*, as requested, judgment will be entered in this court. *Id.* 537.
5. In a case where the jury have disagreed and been discharged, and the case continued over the term, the circuit judge cannot afterwards enter a judgment *non obstante veredicto* on the motion made therefor upon the trial, since the statute, section 1, Act No. 217, Pub. Acts 1915 (3 Comp. Laws 1915, § 14568), contemplates that a verdict must be entered and must be adverse to the party making such request. *Graves v. Township of Dorr*, 558.

See APPEAL AND ERROR (32); DIVORCE (4).

JUDGMENT ENTERED IN SUPREME COURT—See JUDGMENT (4).

JUDICATURE ACT—See MANDAMUS (2).

JUDICIAL NOTICE—See EVIDENCE (11, 13); FIXTURES (2).

JURISDICTION—See **APPEAL AND ERROR** (26); **COMMERCE**; **COURTS**; **CRIMINAL LAW** (6); **EQUITY** (6, 7); **JUSTICES OF THE PEACE**; **PROCESS**; **STATES**.

JURISDICTION OF STATE OVER CEDED TERRITORY—See **STATES**.

JURY TRIAL—See **DEATH ACT** (2); **TRIAL** (9, 22).

JUSTICES OF THE PEACE.

In an action in justice's court for trespass on certain real estate owned in fee by the plaintiffs, where defendants pleaded the general issue and gave notice of justification under authority by plaintiffs to defendants' employer to use the same, and on the trial admitted plaintiffs' title, the justice had jurisdiction to try said cause; 3 Comp. Laws 1915, § 14237, providing that where plaintiff's title shall not be admitted by defendant the justice shall certify the cause to the circuit court, etc., not being applicable. *Maloney v. Webber*, 41.

See **CIRCUIT COURT COMMISSIONERS** (1).

KALAMAZOO CHARTER—See **MUNICIPAL CORPORATIONS** (12).

LABOR LIENS—See **PRINCIPAL AND SURETY**.

LANDLORD AND TENANT.

1. In summary proceedings for the possession of a store building for nonpayment of rent, where defendants tendered into court the amount due, with costs, in compliance with 3 Comp. Laws 1915, § 13253, as amended by section 25, Act No. 243, Pub. Acts 1917, they were entitled to retain possession, and a judgment of restitution is reversed. *Romeo v. Lupo*, 222.
2. The decree of the court below determining that defendants, lessees of space in plaintiff's store building, should have the use of a front portion of one window back to the first panel for display purposes, where it appears that such space had been customarily used by them until friction arose, and their lease gave them the right to "window space for a proper display of millinery," but without specifying the exact space, and also determining the time of payment of money arising from daily sales by plaintiff to defendants, and the time of payment by defendants to plaintiff of the rent, *held*, justified by the record. *Goodman, v. Diamond*, 273.
3. Where a lease is susceptible of more than one construction, that most favorable to the lessee must prevail. *Park Building Co. v. George P. Yost Fur Co.*, 349.
4. A lease providing that the lessee should pay all taxes of every nature and kind whatsoever, levied upon said premises, specifying the same in apt and appropriate terms, and further providing that it was the intent to insure to lessor a net rental, but containing no reference what-

LANDLORD AND TENANT—Continued.

- ever to lessor's Federal income tax, construed, and *held*, not to be the intent of the parties that the lessee should pay the lessor's Federal income tax based upon said rental. *Id.*
5. The lease of a house by street number included so much of the lot on which the building stood as was necessary to the complete enjoyment of the building for the purpose for which it was let, and nothing more. *Meredith v. McCormick*, 563.
 6. The lessee of a building for a rooming house could lawfully use a portion of the back yard for the purpose of piling wood to be seasoned for use, this being necessary to the complete enjoyment of the building for the purpose for which it was let. *Id.*
 7. The lessee was also entitled to the unobstructed use of a cement walk extending from the rear of the building to the alley for the purposes of ingress and egress, removal of garbage, and other like uses, and the building of a garage over the cement walk, thus interfering with access to the alley, would be an encroachment upon the lessee's rights. *Id.* 564.
 8. The lessee is entitled to an injunction restraining the lessor's successor from interfering with lessee's right to pile wood in the back yard, and from building a proposed garage obstructing the cement walk; the latter to be dissolved when a walk shall be built upon the south and west sides of the proposed garage. *Id.*

See FRAUDS, STATUTE OF (6); RAILROADS (2).

LEASE—See LANDLORD AND TENANT.

LEGAL AND EQUITABLE RIGHTS OF OTHERS—See SUBROGATION (3).

LEGISLATIVE CONTROL—See MUNICIPAL CORPORATIONS (8).

LEGISLATIVE INTERFERENCE—See MUNICIPAL CORPORATIONS (10).

LEGISLATIVE POWERS—See STATUTES (1).

LESSER OFFENSE—See CRIMINAL LAW (1-3, 5).

LETTER ACCUSING OF CRIME—See LIBEL AND SLANDER.

LETTER TO FATHER OF ACCUSED—See LIBEL AND SLANDER (3).

LIABILITY FOR COMMISSION—See BROKERS.

LIABILITY WHERE SEVERAL BROKERS EMPLOYED—See BROKERS (3).

LIBEL AND SLANDER.

1. The writing and sending of an unsigned letter by defendant to plaintiff, a boy about 15 years of age, accusing him of larceny, was no such publication as would support an action for libel, although the letter was received, opened, and read by plaintiff's mother. *Zantley v. Hyde*, 96.
2. Where a party makes a communication and such communication is prompted by a duty owed either to the public or to a third party, or the communication is one in which the party has an interest and it is made to another having a corresponding interest, the communication is privileged if made in good faith and without actual malice. *Id.*
3. Where defendant believed that a boy related to him had taken his children's banks and money and wrote to him to return the same, but, receiving no reply, wrote the facts to the boy's father, such communication was qualifiedly privileged, being written in the discharge of a moral duty. *Id.*
4. It is the occasion, and not the language used, which determines whether a communication is qualifiedly privileged. *Id.* 97.
5. A letter to a father imputing the crime of larceny to his son is libelous *per se*, and malice will be presumed. *Id.*
6. But where it appeared that such communication was privileged, the presumption of malice was rebutted, and the burden of proving actual malice or a lack of good faith on the part of defendant devolved on plaintiff. *Id.*
7. The evidence to prove same may be either intrinsic, being shown by the nature of the language used and the manner and extent of its publication, or extrinsic, consisting of facts which show previous ill-feeling or personal hostility, or that the letter was written without the defendant's having made reasonable inquiry and investigation and not in good faith. *Id.*
8. Where the record shows that plaintiff's counsel, at the close of the proofs, and also on motion for new trial, conceded that there was no evidence of malice, either in law or in fact, in the writing of the letter sued on, the trial judge properly directed a verdict for defendant. *Id.*

LIBELOUS PER SE—See LIBEL AND SLANDER (5).

LIENS—See EQUITY (7).

LIFE ESTATES—See DEEDS (4).

LIFE INSURANCE—See INSURANCE (3, 4); TRIAL (14).

LIMITATION OF ACTIONS.

1. 3 Comp. Laws 1915, § 12335, does not make indorsements of payments on notes incompetent as evidence, but de-

LIMITATION OF ACTIONS—Continued.

clares them to be insufficient in themselves to take the case out of the operation of the statute of limitations. *Judson v. Pratt*, 286.

2. In an action on certain promissory notes claimed by defendant to be barred by the statute of limitations, defendant's objection to the introduction of the notes with indorsements of payments thereon will not be considered by the appellate court, where, after the objection, other evidence was introduced rendering them admissible; the objection going merely to the order of proof. *Id.*
3. In such action, certain exhibits, properly identified, tending to show that defendant had sold certain produce to the payee and received payment therefor partly by indorsements on the notes, and partly by check, which was dated the same day as the indorsements, *held*, admissible. *Id.* 287.

See DISMISSAL AND NONSUIT (2).

LIMITING ARGUMENT—See APPEAL AND ERROR (8).

LIVING TOGETHER—See PARENT AND CHILD.

LOCAL SELF-GOVERNMENT—See MUNICIPAL CORPORATIONS (10); STATUTES (1).

MALICE, ABSENCE OF—See LIBEL AND SLANDER (8).

MALICE, PRESUMPTION OF—See LIBEL AND SLANDER (5).

MALPRACTICE—See JUDGMENT (3).

MANDAMUS.

1. On mandamus against a circuit judge, the return of the judge unless traversed must be taken as true. *Kentucky Wagon Manfg. Co. v. Kalamazoo Circuit Judge*, 267.
2. Under section 4, chap. 36, of the judicature act (3 Comp. Laws 1915, § 13440), which supersedes sections 9970, 9971, 3 Comp. Laws 1897, the person prosecuting the writ of mandamus may plead to any or all of the material facts contained in the return, and such issue of fact shall be determined as in other cases; but all material facts stated in said return not specifically denied shall be taken to be admitted as true. *Thiedemann v. Michigan State Board of Dental Examiners*, 552.
3. Where plaintiff's plea denied all of the material statements in defendant's answer, but the material facts necessary to the disposal of the issues thus formed are not available to this court, the case will be referred to the circuit court to take testimony thereon and return same to this court with the opinion of the court thereon. *Id.* 553.

MANDAMUS—Continued.

4. *Ex parte* affidavits in support of the return, filed four or five months after it was filed, cannot be considered by this court, since affidavits of others than the defendant, attached even to the return, are properly no part thereof. *Id.*

MASTER AND SERVANT.

1. In an action for the death of plaintiff's decedent in a sawmill accident, where the only testimony touching the competency of the man in charge was that he was a competent and careful man, there was no issue on that question for the jury. *Smith v. Hyne*, 334.
2. Evidence in support of plaintiff's contention that the crew in charge of the sawmill was insufficient, *held*, insufficient to go to the jury. *Id.* 335.
3. Plaintiff's contention that deceased was not furnished a safe place in which to work, *held*, not supported by the record, where the evidence shows that he was engaged as a setter in a safe place, but that unexpectedly and contrary to orders he left his position for that of tail sawyer and in attempting to return by crossing the carriage fell and was killed. *Id.*
4. Where defendant employer had not come under the workmen's compensation act, the common-law defenses of assumption of risk, negligence of fellow-servant, and contributory negligence of the injured employee were not available under 2 Comp. Laws 1915, § 5423, unless such contributory negligence was willful. *Id.*
5. In the absence of evidence of negligence on the part of the employer, the kind or degree of the employee's negligence is immaterial. *Id.*
6. In such action, evidence *held*, insufficient to establish actionable negligence on the part of the employer. *Id.*
7. Where an application for compensation for the death of a son, under the workmen's compensation act, was filed by the father only, but during the preliminary proceedings thereto it was understood and acknowledged by the insurer that claimant was acting on behalf of himself, his wife, and minor children, all of whom were partial dependents, the industrial accident board properly entered an order continuing the weekly payments to the wife and children upon their petition, after the death of the father, under part 2, § 7, of said act, although the original award was entered in the name of the father only; defendant being estopped from now denying what it heretofore admitted to be true. *Byle v. Grand Rapids Blow Pipe & Dust Arrester Co.*, 638.
8. On certiorari to review said order, defendant cannot take the position that the claim of the mother and her children was not passed upon in the original proceedings, where it

MASTER AND SERVANT—Continued.

appears that the father was accepted by it as representing all of the dependents. *Id.*

9. Nor can defendant raise the question of the amount of said award, where it appears that it withdrew its appeal from the award of the arbitration committee to the full board wherein it claimed the amount was too high, and consented to an affirmance of said award. *Id.*

See EVIDENCE (3, 5).

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED
—See EVIDENCE (5).**MINORS—See INTOXICATING LIQUORS (1-5).****MISCARRIAGE OF JUSTICE—See CRIMINAL LAW (12); PRINCIPAL AND SURETY (3).****MITIGATION OF DAMAGES—See INTOXICATING LIQUORS (4).****MORTGAGES.**

1. On a bill for the discharge of two mortgages, the finding of the court below that the debt of plaintiff represented by said mortgages was paid in full, *held*, supported by the record. *Ebert v. Corning*, 219.
2. In a suit to set aside a mortgage, to restrain its foreclosure, and hold it invalid in the hands of defendant, assignee, for fraud in its inception, where defendant, by cross-bill, seeks affirmative relief by way of foreclosure, the burden is upon him to show *bona fides* in the assignment. *Jones v. Titus*, 392.
3. When a note given with a mortgage was indorsed over to a third party, it carried with it the equitable title to the mortgage. *Id.*
4. The finding of the court below that the bank, assignee of the mortgage, was a holder in good faith and entitled to foreclosure, *held*, supported by the record, although it is disclosed that plaintiff was defrauded in the transaction involving the making of the mortgage. *Id.* 393.
5. Where a trust deed was executed as security for a loan at a bank, and the bank refused the loan, the deed never took effect, and its assignment by the trustee was without consideration. *Parks v. Sherman*, 697.

See NAMES; SUBROGATION (2).

MOTION TO DISMISS—See DISMISSAL AND NONSUIT.**MOTIVE—See INTOXICATING LIQUORS (5).****MOTOR VEHICLE LAW—See MOTOR VEHICLES (3).**

MOTOR VEHICLES.

1. Evidence as to rate of speed at which defendant was driving his automobile, and as to his intoxication, at the time of the accident, *held*, sufficient to carry the case to the jury. *Roy v. Kirn*, 572.
2. Where an owner is gratuitously carrying a guest in his automobile he must be mindful of the life and limb of his guest, and shall not unreasonably expose him to an additional peril, a guest only assuming the risks ordinarily arising from riding in an automobile when the machine is controlled and managed by a reasonably prudent man who will not, by his own want of due care, increase his danger or subject the guest to a newly-created danger. *Id.*
3. The provisions of the motor vehicle law (1 Comp. Laws 1915, § 4825), providing that the owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation thereof, whether such negligence consists in the violation of the provisions of the statutes of the State or in failing to observe such ordinary care in such operation as the rules of the common law require, apply as between the owner of a car driving the same and an occupant thereof riding gratuitously as a guest. *Id.*

MULTIPLICITY OF SUITS—See ACTION.

MUNICIPAL CORPORATIONS.

1. In an action against a township for personal injuries alleged to have been received by reason of defendant's negligence in maintaining the highway in a reasonable state of repair under section 4586, 1 Comp. Laws 1915; testimony *held*, to present a question of fact for the jury. *Vinton v. Township of Plainfield*, 179.
2. It cannot be said that plaintiff was guilty of contributory negligence, as a matter of law, because he rode down a hill, on a defective highway, upon a load of straw, since the highways are made for farmers as well as others. *Id.*
3. Where plaintiff used no breeching on his horses, and the testimony as to the need of same was very conflicting, instructions by the court to the effect that the lack of breeching would not be important unless the jury found that it was one of the contributory causes of the injury, *held*, not misleading because negative. *Id.*
4. Negligence of the son, who was driving the team, would be imputable to plaintiff, who was riding on the load. *Id.* 180.
5. Where a plat in the city of Detroit containing a street of extra width was dedicated and accepted with the understanding that the same should be a boulevard and that funds for its improvement should be raised by general tax as provided in the charter of said city for improving parks and boulevards, the action of the city council in

MUNICIPAL CORPORATIONS—Continued.

afterwards placing said boulevard under the control of the street committee and assessing a special tax for paving against abutting owners, *held*, illegal and void. *MacLachlan v. City of Detroit*, 188.

6. The status of plaintiff, a purchaser of a lot abutting said boulevard, in a suit to enjoin the collection of said illegal tax, could not be affected by the fact that one of the aldermen who voted for the paving was one of the stockholders in the corporation owning said plat. *Id.*
7. Municipal corporations created by the legislature have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers, acting by a delegated authority, and can exercise those powers only which are expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant. *City of Kalamazoo v. Titus*, 252.
8. Although the Constitution of 1909 provided that cities and villages might acquire, own, and operate public utilities, etc., it recognized and affirmed the theory that cities owe their origin and their powers to the legislature, and that the latter has general control over them. *Id.*
9. If a city has power to regulate the rates of public utility companies using the streets, alleys or public places of the city in any case, it is a derived, a delegated, power, the source of which is the Constitution and the general law under which it is organized. *Id.*
10. Power to regulate rates of public utility companies is not a power necessary to local self-government, denial of which, or interference with the exercise of which, by the legislature, would be interference with local self-control. *Id.*
11. Although the "Home Rule Act" (Act No. 279, Pub. Acts 1909, 1 Comp. Laws 1915, § 3304 *et seq.*) delegated to cities the power to provide for the use, regulation, and control of their streets by public utility companies, the power to fix compulsory rates cannot be inferred, where it was not expressly delegated. *Id.* 253.
12. No power having been delegated to cities under the "Home Rule Act" to fix compulsory rates for public utility companies, the city of Kalamazoo had no authority, under its charter, adopted in pursuance of said act, to prescribe compulsory rates for gas, and an ordinance prescribing rates at which gas should be furnished to consumers and providing a penalty for its violation, is therefore void. *Id.*
13. If in the settlement of a claim by a waterworks company against a city, the city attempted to acquire or purchase a public utility within the meaning of the charter language, then the terms of the charter must be complied with. *Schurtz v. City of Grand Rapids*, 510.

MUNICIPAL CORPORATIONS—Continued.

14. An attempt by the city of Grand Rapids, in the settlement of a claim against it for water furnished, to take over the property of a privately owned waterworks plant, without the same having received the affirmative vote of three-fifths of the electors voting thereon, *held*, to be a transaction involving the acquiring of a public utility within the meaning of section 25, Art. 8, Constitution of Michigan, and section 28, Art. 8, of the city charter adopted in pursuance of the "Home Rule Act" (Act No. 279, Pub. Acts 1909), and therefor void. *Id.*
15. A resident taxpayer and qualified elector of defendant city has an interest in the several funds of the city and in their integrity, and may maintain suit to restrain the city from acquiring a public utility not receiving the sanction of three-fifths of the electors voting thereon as required by the Constitution and the city charter. *Id.* 511.

See ELECTION OF REMEDIES; EVIDENCE (6, 14); HIGHWAYS AND STREETS (1, 2).

MURDER—See CRIMINAL LAW (13).

MUTUAL INSURANCE COMPANIES—See INSURANCE (1-6).

NAMES.

A bank cashier, assignee of a mortgage in his own name, was not precluded from foreclosing same by Act No. 101, Pub. Acts 1907 (2 Comp. Laws 1915, § 6349 *et seq.*), requiring any person or persons doing business under an assumed name to file a certificate, etc., because the bank, to facilitate its bookkeeping, had devised a system of handling past-due paper by assigning it to the cashier as "Trustee for Trust Mortgage Syndicate," where the testimony shows that this name was used only as a memorandum, apparently for the purpose of carrying the account and to prevent the "charging off" of these items. *Jones v. Titus*, 392.

NEGLIGENCE.

1. There is no imperative rule of law requiring a pedestrian, when approaching a street crossing, to look both ways before stepping off the curb; reasonable care under the surrounding circumstances being all that is required. *Benjamin v. McGraw*, 75.
2. The driver of an automobile approaching a crossing on a city street is required to exercise such reasonable care as the case requires. *Id.*
3. In an action for personal injuries to a pedestrian who attempted to cross a city street at a public crossing, where he turned back to avoid defendant's automobile and was struck by it after he regained the curb, questions of negligence and contributory negligence, *held*, for the jury. *Id.* 76.

NEGLECT—Continued.

4. The negligence of the driver of an automobile is imputable to a passenger, and in an action for the death of the passenger it is incumbent to show, before recovery can be had, that no negligence of either caused or contributed to the accident. *Jewell v. Rogers Township*, 318.

See APPEAL AND ERROR (31); CARRIERS (1, 4); HIGHWAYS AND STREETS (1); MASTER AND SERVANT (1-6); MOTOR VEHICLES; MUNICIPAL CORPORATIONS (1-4); RAILROADS; STREET RAILWAYS.

NEWLY-DISCOVERED EVIDENCE—See NEW TRIAL (3, 5-7, 10, 11).

NEW TRIAL.

1. Reasons which might have been presented to the trial court on a motion for a new trial cannot be considered by this court, on error, where no such motion was made. *People, for Use of Ryan, v. Boyes*, 58.
2. The verdict of the jury in favor of plaintiff, *held*, not so overwhelmingly against the weight of the evidence as to call for a new trial. *Rice v. Michigan R. Co.*, 125.
3. Where plaintiff's motion for a new trial on the ground of newly-discovered evidence was supported by an affidavit that, after the date of the alleged agreement releasing defendant from his obligation to pay plaintiff, defendant stated to affiant that he wanted to borrow money to pay up plaintiff, *held*, that the trial court was in error in concluding that such testimony was inadmissible as tending to show a compromise, since affiant apparently had no knowledge of such effort, if any was being made, and that under the facts of this case a new trial should have been granted. *Freeman v. Hoag*, 245.
4. Where the trial judge, who was familiar with the locality, and who heard and saw the witnesses, after twice reviewing the case, declined to disturb the verdict of the jury, or hold that it was against the great weight of the evidence, this court will not, on error, substitute its judgment for that of the jury or the trial judge. *Jewell v. Rogers Township*, 319.
5. It was not error to refuse a new trial on the ground of newly-discovered evidence, where such evidence was the fact that defendant had applied to a building and loan association for a loan, and, upon the record, was known to plaintiff at the time of the trial. *Michaels v. Pinten*, 455.
6. Motions for new trials upon the ground of newly-discovered evidence are not favored by the courts. *Id.* 456; *Roy v. Kirtz*, 572.
7. Where the most that can be said for newly-discovered evidence is that it might have tended to impeach defendant in some particulars, but there was lack of due dili-

NEW TRIAL—Continued.

gence on the part of plaintiff, a new trial on this ground was properly denied. *Michaels v. Pinten*, 456.

8. Verdict *held*, not to be against the overwhelming weight of the evidence. *Id.*

9. It cannot be said that the verdict was overwhelmingly against the weight of the evidence so as to call upon this court to interfere with it. *Roy v. Kirn*, 572.

10. The trial court was not in error in denying a motion for a new trial on the ground of newly-discovered evidence, where the record shows that the case had been at issue for more than a year, and in less than a month after the trial the whereabouts of the absent witness was discovered. *Id.*

11. An affidavit for a new trial, alleging that affiant made diligent search for an absent witness, without setting forth the efforts made, states but a mere conclusion. *Id.*

See APPEAL AND ERROR (27, 29); CRIMINAL LAW (6); PRINCIPAL AND SURETY (3).

NON OBSTANTE VEREDICTO—See JUDGMENT (3-5).

NONENFORCEMENT OF RULE—See CARRIERS (14).

NONPAYMENT OF DUES—See INSURANCE (3).

NOTICE—See ABSTRACTS OF TITLE (3); INTOXICATING LIQUORS (5); NEW TRIAL (3); WAIVER.

NOTICE TO REDEEM—See TAXATION (4, 6).

OFFENSE—See INTOXICATING LIQUORS (7).

OFFICERS—See CORPORATIONS (1).

OPERATION BY GOVERNMENT—See RAILROADS (2).

OPINION—See FRAUD (3).

OPINION BASED ON TESTIMONY—See TRIAL (4).

OPINION OF TRIAL COURT—See TRIAL (8).

ORAL CONTRACT FOR CONVEYANCE OF LAND—See FRAUDS, STATUTE OF (1-8); SPECIFIC PERFORMANCE (2).

ORAL LEASE FOR MORE THAN ONE YEAR—See FRAUDS, STATUTE OF (1).

ORAL PROMISE TO PAY DEBT OF ANOTHER—See FRAUDS, STATUTE OF (9).

ORAL TESTIMONY—See EVIDENCE (1); TAXATION (6).

ORDER OF PROOF—See LIMITATION OF ACTIONS (2).

ORDINANCES—See MUNICIPAL CORPORATIONS (12).

OTHER OFFENSES—See CRIMINAL LAW (13).

OVERWHELMING WEIGHT OF EVIDENCE—See NEW TRIAL (2, 8, 9).

PARENT AND CHILD.

The existence of the relation of parent and child is a question of fact, and is established *prima facie* where it is shown that the parties lived together, and recognized by their acts the existence of that relation. *Livernash v. DeLorme*, 296.

See EVIDENCE (8, 10); DEATH; WITNESSES.

PAROL EVIDENCE—See EVIDENCE (1, 10, 16).

PART PERFORMANCE—See FRAUDS, STATUTE OF (3, 5, 6, 8); SPECIFIC PERFORMANCE (2).

PARTIES—See ABSTRACTS OF TITLE (1); APPEAL AND ERROR (14); CORPORATIONS (6); MASTER AND SERVANT (7, 8).

PARTNERSHIP.

In a suit for a partnership accounting, the decree of the court below in favor of plaintiff, *held*, justified by the record. *Veenstra v. DeGolla*, 491.

PARTY DAMAGED—See ABSTRACTS OF TITLE (4).

PARTY SUGGESTING POSTPONEMENT IMMATERIAL—See COSTS (2).

PASSING OF TITLE—See SALES (1, 2).

PASSIVE TRUSTS—See TRUSTS.

PASSIVE TRUSTS EXECUTED BY STATUTE OF USES—See TRUSTS (1).

PAST-DUE RENT PERSONALTY—See PROPERTY.

PAST TRANSACTIONS—See EVIDENCE (2, 3).

PAUPERS—See ELECTION OF REMEDIES.

PAVING TAX—See MUNICIPAL CORPORATIONS (5).

PAYMENT—See ABSTRACTS OF TITLE (2); MORTGAGES (1).

PEACEABLE POSSESSION—See LANDLORD AND TENANT (8).

PEDESTRIANS—See NEGLIGENCE (1).

PEDIGREE—See EVIDENCE (7-10); TRIAL (11); WITNESSES.

PERMANENT INJURIES—See DAMAGES.

PERSONAL INJURIES—See DAMAGES; EVIDENCE (3); MUNICIPAL CORPORATIONS (1-4); NEGLIGENCE (3); STREET RAILWAYS.

PHYSICIANS AND SURGEONS—See JUDGMENT (3).

PLACE OF DELIVERY—See SALES (3).

PLEA—See MANDAMUS (2).

PLEA IN BAR—See DISMISSAL AND NONSUIT.

PLEADING.

In an action against a railroad company in charge of the director general for damage to property by fire, the defense that the railroad company had committed no negligent act, and that any negligent acts proven were the negligent acts of the agents of the director general was not an affirmative defense under section 2 of Circuit Court Rule No. 23, nor would such defense be likely to take plaintiff by surprise. *Peacock v. Detroit, etc., R. Co.*, 403.

See APPEAL AND ERROR (23); DISMISSAL AND NONSUIT; EQUITY (6).

POSITIVE TESTIMONY—See EVIDENCE (9).

POSSESSION—See FRAUDS, STATUTE OF (4, 5); LANDLORD AND TENANT (1).

POSSESSION BY DRAYMAN—See INTOXICATING LIQUORS (7).

PRACTICE—See APPEAL AND ERROR (22); NEW TRIAL (1).

PREJUDICE—See APPEAL AND ERROR (12); DAMAGES (2).

PREPONDERANCE OF EVIDENCE—See DEEDS (2).

PRESUMPTION OF DEATH—See ESCHEATED ESTATES.

PRESUMPTION OF INNOCENCE—See CRIMINAL LAW (11, 12).

PRESUMPTION REBUTTED—See LIBEL AND SLANDER (6).

PRESUMPTIONS—See DEEDS (6).

PRIMA FACIE EVIDENCE—See PARENT AND CHILD.

PRINCIPAL AND AGENT—See EVIDENCE (2); USURY.

PRINCIPAL AND SURETY.

1. The surety on two separate bonds of a subcontractor, given to indemnify the principals for any loss accruing to them under their contracts, is liable for the amount of a judgment secured against them jointly on their bonds for labor liens by an employee of said subcontractor; no separate account of the work done under each subcontract having been kept. *Sullivan v. Fidelity & Casualty Co. of New York*, 68.
2. In an action by one of the principals on his own account and as assignee of the claim of the other to recover the amount of said judgment, which they had apportioned between themselves, from the surety of the subcontractor, he had the right, under 3 Comp. Laws 1915, § 12309, to 208—Mich.—48.

PRINCIPAL AND SURETY—Continued.

join both claims, nor was it necessary for him to make proof under each claim as though separate suits had been brought. *Id.*

3. Even if proof of damages in each claim should have been made separately, it is not reversible error under 3 Comp. Laws 1915, § 13763, since it in no way increased defendant surety's liability, and therefore cannot be said to have resulted in a miscarriage of justice. *Id.*
4. Testimony supporting defendant surety's contention that it was released because defendant subcontractor was paid more than 80 per cent. on completed work in violation of the terms of his contract, *held*, not so conclusive as to justify setting aside the verdict of the jury. *Id.*

PRIVILEGE—See EVIDENCE (5).

PRIVILEGED COMMUNICATION—See LIBEL AND SLANDER (2-4, 6).

PRIVITY OF CONTRACT—See ABSTRACTS OF TITLE (2).

PROBATE COURTS—See APPEAL AND ERROR (13, 15); DEATH ACT (1).

PROCESS.

1. A summons in summary proceedings issued by a circuit court commissioner and served by the officer by substituted service on defendant the day before the time of appearance did not confer jurisdiction upon the commissioner, since the statute (3 Comp. Laws 1915, § 13243) requiring the service to be made two days before the time of appearance applies as well to substituted as to personal service. *Zimmerman v. May*, 55.
2. The service of a copy of the rule to plead, instead of a notice thereof, on defendant, at the time of service of the declaration, was not such a defect in the proceedings as to affect the regularity of the entry of default, and thus toll Circuit Court Rule No. 32, § 4, providing that where personal service shall have been had, and proceedings taken after default on the strength thereof, the default shall not be set aside unless the application shall be made within six months after such default is regularly filed. *Kentucky Wagon Manfg. Co. v. Kalamazoo Circuit Judge*, 267.
3. Where suit was started by declaration, attaching thereto a rule to plead and notice of rule to plead, there was a substantial compliance with the judicature act (3 Comp. Laws 1915, § 12407), and the trial judge was in error in holding that service of the rule to plead and notice thereunder was insufficient to confer jurisdiction. *Grocers, Inc., v. Allegan Circuit Judge*, 270.

PROOF—See TRIAL (1).

PROPERTY.

Rent past due, *held*, to be personal property. *Park Building Co. v. George P. Yost Fur Co.*, 349.

PROPERTY RIGHTS—See **DIVORCE** (1, 2).

PUBLICATION—See **LIBEL AND SLANDER** (1).

PUBLIC UTILITIES—See **GAS**; **MUNICIPAL CORPORATIONS** (8, 9, 11, 13-15); **WORDS AND PHRASES**.

PURCHASE OF STOCK—See **CORPORATIONS** (4).

PUTTING VERDICT IN LEGAL FORM—See **DEATH ACT** (2).

QUALIFIED PRIVILEGE—See **LIBEL AND SLANDER** (3).

QUESTION OF FACT—See **TRIAL** (2).

QUIETING TITLE.

A court of equity has no jurisdiction under 3 Comp. Laws 1915, § 12302, to entertain a bill to quiet title where plaintiffs claim a legal, record title and do not allege any fraud, accident, mistake, or other grounds of general equity jurisdiction, nor point out any impediment to their defense in an action of ejectment already pending. *Carpenter v. Dennison*, 441.

RAILROADS.

1. A railroad company which has leased its property to another is not liable for the negligent acts of such other. *Peacock v. Detroit, etc., R. Co.*, 403.

2. During the control of the railroads as a war measure by the United States government by a director general (39 U. S. Stat. p. 645, 40 U. S. Stat. p. 1733, 40 U. S. Stat. p. 451 *et seq.*) the relations between a railroad and the government were either technically those of lessor and lessee or analogous thereto. *Id.*

3. In an action against a railroad company for damages to plaintiff's auto truck, received in collision with defendant's engine upon a highway crossing, where the evidence shows that plaintiff with his chauffeur drove at the regular rate of speed upon the crossing, which was known by them to be a dangerous one, without stopping to look and listen, he was guilty of contributory negligence, barring recovery. *Hardy v. Pere Marquette Railway Co.*, 622.

See **APPEAL AND ERROR** (23); **CARRIERS** (9-17); **COMMERCE**.

RAPE—See **CRIMINAL LAW** (1, 4, 7).

RATES—See **MUNICIPAL CORPORATIONS** (9-11).

READY, WILLING AND ABLE—See **BROKERS** (2, 3).

REASONABLE DOUBT—See **CRIMINAL LAW** (7, 11).

REBUTTAL—See **DEEDS** (6); **TRIAL** (17).

RECORD—See APPEAL AND ERROR (3); EVIDENCE (15).

RECORDS BEST EVIDENCE—See APPEAL AND ERROR (30); EVIDENCE (14).

REFERENCE TO CIRCUIT COURT TO TAKE TESTIMONY ON ISSUES—See MANDAMUS (3).

REGULARITY—See PROCESS (2).

REHEARING—See JUDGMENT (2).

RELATION OF CARRIER AND PASSENGER—See CARRIERS (2).

RELEASE.

Where plaintiff, in an action for personal injuries, denied ever knowingly or understandingly signing a release, or receiving any money therefor, defendant's claim that evidence impeaching the release was inadmissible because plaintiff had not offered to return the money claimed to have been paid cannot be sustained. *Roy v. Kira*, 371.

See CONTRACTS (1).

RELEASE OF SURETY—See PRINCIPAL AND SURETY (4).

RELIANCE UPON DEFECTIVE ABSTRACT—See ABSTRACTS OF TITLE (5).

RELIANCE UPON REPRESENTATIONS—See FRAUD.

RELIEF—See EQUITY (5-7).

REPRESENTATIONS—See FRAUD (1, 4).

REPUDIATION—See RELEASE.

REPUTATION IN COMMUNITY AS TO BEING DAUGHTER OF ALLEGED PARENTS—See WITNESSES.

REQUESTS TO CHARGE—See APPEAL AND ERROR (6, 17); TRIAL (16).

REQUESTS TO CHARGE COVERED BY GENERAL CHARGE—See TRIAL (18).

RESCISSION—See EQUITY (2, 3, 6); FRAUD (4).

RES JUDICATA—See ACTION; APPEAL AND ERROR (26); DISMISSAL AND NONSUIT (3); JUDGMENT (1, 2).

RESTITUTION—See LANDLORD AND TENANT (1).

RETURN—See MANDAMUS (2, 4).

RETURN TO BE TAKEN AS TRUE UNLESS TRAVERSED—See MANDAMUS (1).

RIGHT OF APPEAL—See APPEAL AND ERROR (25).

RIGHT TO REJECT AFTER ACCEPTANCE—See SALES (2).

RIGHT TO USE OF WALK TO REAR ALLEY—See LANDLORD AND TENANT (7).

RIGHTS OF COMPANY DERIVED FROM STATE—See GAS.

RULE—See MOTOR VEHICLES (2).

RULE OF CARRIER—See COMMERCE (3).

SAFE PLACE TO WORK—See MASTER AND SERVANT (3).

SALE OF ASSETS—See CORPORATIONS (1).

SALE OF STOCK—See CORPORATIONS (6, 7, 10).

SALES.

1. In the sale of goods the general rule that title passes when the vendor has fully performed in the appropriation and delivery of the goods to the vendee, and delivery to a public carrier for transportation constitutes delivery to the vendee, has been adhered to in this State, and is, in effect, incorporated in the uniform sales act (3 Comp. Laws 1915, §§ 11849, 11850, 11873, 11877). *Dow Chemical Co. v. Detroit Chemical Works*, 157.
2. Title may pass even though the right to reject after acceptance be reserved. *Id.*
3. A provision in a contract for the sale of 900 tons of sulphuric acid to be delivered in monthly installments providing that the price should be "\$12 per ton f. o. b. vendor's tank cars, Detroit, Mich., less freight to Midland, Mich.," construed, and *held*, that place of delivery was at Detroit, although the buyer had the right to deduct the freight to Midland. *Id.*
4. In view of section 42 of the uniform sales act (3 Comp. Laws 1915, § 11873) fixing the time of payment concurrent with delivery unless otherwise provided, where the contract provided payment to be "net cash in ten days," payment was due ten days from delivery of each installment at Detroit. *Id.*
5. Where the contract gave the vendor the option, in case the buyer failed to make payment according to its terms, to delay further shipment until payment was made or cancel the contract, the vendor had the right, when the buyer failed to make payment within ten days of delivery at Detroit, to cancel the contract. *Id.*
6. Although the contract provided for approximately equal monthly shipments, where first shipment was made on January 22d in response to buyer's notification on January 20th, and second shipment for that month was made on February 3d, *held*, that the vendor was not in default in not making shipment of second installment in January. *Id.* 158.

See FRAUDULENT CONVEYANCES (1).

SAVING QUESTIONS FOR REVIEW—See APPEAL AND ERROR (3, 16, 20, 21); TRIAL (3).

SCHOOLS AND SCHOOL DISTRICTS.

The provisions of 2 Comp. Laws 1915, § 5712, authorizing any school district by a majority vote of its qualified electors to bond for an amount not exceeding 10 per cent. of its assessed valuation, *held*, applicable to the Union School District of the City of Owosso, in view of Act No. 368, Laws 1871, creating said district, providing that it should have all the powers and privileges conferred upon school districts by general law in addition to those conferred by the local act, although by said local act its bond limit at that time was fixed at \$50,000, which was the same as then provided in the general law. *Board of Education of the Union School District of the City of Owosso v. Goodrich*, 646.

SECONDARY EVIDENCE—See **EVIDENCE** (9).

SEDUCTION—See **TRIAL** (4).

SEPARATE PROOF—See **PRINCIPAL AND SURETY** (2).

SERVICE—See **PROCESS**.

SET-OFF—See **TRIAL** (1).

SETTING ASIDE AMENDED DECREE—See **DIVORCE** (3).

SETTING ASIDE DEFAULT—See **PROCESS** (2).

SHIPMENT IN INSTALLMENTS—See **SALES** (6).

SIMPLE ASSAULT—See **CRIMINAL LAW** (1, 3).

SPECIAL ASSESSMENTS—See **MUNICIPAL CORPORATIONS** (5).

SPECIFIC PERFORMANCE.

1. Specific performance of a contract, whether written or oral, is not a matter of strict legal right, but rests in the sound discretion of the court. *Harrison v. Easson*, 685.
2. In proceedings for the specific performance of an oral contract for the conveyance of land, the acts of part performance by plaintiffs, permitted by defendant as though accepting the void contract as valid, must be to an extent and of a kind to create such strong equities in plaintiffs' favor that courts of equity should not permit the statute of frauds to be used as an instrument of fraud. *Id.*

See **FRAUDS, STATUTE OF** (5, 7).

SPLITTING CAUSE OF ACTION—See **ACTION**.

STATE COURTS—See **COMMERCE** (2, 3).

STATEMENTS OF MOTHER AT TIME OF BIRTH OF CHILD
—See **EVIDENCE** (10).

STATEMENTS OF PARENTS—See **EVIDENCE** (8).

STATES.

1. The jurisdiction over the St. Mary's Falls ship canal ceded to the United States by the State of Michigan in Act No. 17, Pub. Acts 1881, construed, and *held*, to be less than exclusive; the purpose being to confer upon the United States exclusive power to control the canal, and any buildings and works connected therewith for the purposes of operation. *Oscar Daniels Co. v. City of Sault Ste. Marie*, 363.
2. The jurisdiction ceded by said act being less than exclusive, and the ceded territory not being out of the State so far as the operation of its tax laws are concerned, a tax levied upon private personal property thereon within the limits of the city of Sault Ste. Marie, by said city, although employed in contract construction work for the United States government, *held*, valid. *Id.*

STATUTE OF FRAUDS—See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

STATUTES.

1. By our system of State government the right of local self-government is, and always has been, a part of the system, but under the Constitution the legislative power of the State, and all of it, is reposed in the legislature, save only as reserved by referendum and initiative. *City of Kalamazoo v. Titus*, 252.
 2. "That which is expressed makes that which is implied to cease." *Schurtz v. City of Grand Rapids*, 511.
 3. That a general act will not repeal a special or local inconsistent act on the same subject is not a rule of positive law, but only one of the rules of construction recognized as raising such presumption, refutable and with the limitation that it must yield to an otherwise manifest legislative intent appearing in the language of the act, which is to be construed in the light of its subject-matter and purposes, other existing legislation upon the same subject, the relative times of their enactment, with all circumstances or related matter proper to consider for the purpose of discovering the legislative intent. *Board of Education of the Union School District of the City of Owosso v. Goodrich*, 646.
 4. While not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws, and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature. *Id.* 647.
- See CIRCUIT COURT COMMISSIONERS; COSTS (1, 3); CRIMINAL LAW (6, 12); DIVORCE (1); EVIDENCE (4, 5); INTOXICATING LIQUORS (4, 6, 7); JUSTICES OF THE PEACE; NAMES; PRINCIPAL AND SURETY (3); PROCESS; STATES (1).

STATUTORY RAPE—See CRIMINAL LAW (1-5).

STIPULATED FACTS PRESENTING QUESTION OF LAW—
See APPEAL AND ERROR (22).

STIPULATION TO POSTPONE—See COSTS (2).

STOCK AND STOCKHOLDERS—See CORPORATIONS (5, 10).

STREET RAILWAYS.

1. In an action for the death of plaintiff's decedent, who was struck and injured by defendant's east-bound street car after alighting from and passing around in front of a west-bound car, where it appears that the physical facts were such that it would have been impossible for the motorman, no matter how malicious, careless, or incompetent he was, to have run down decedent if he had exercised due care in stepping upon the track, the trial judge properly directed a verdict for defendant. *Goodman v. Detroit United Railway*, 279.
2. A bright, intelligent boy, of the age of 7 years and 5 months, who slid down a steep hill onto a street car track, knowing that cars were running thereon at frequent intervals, riding feet foremost and lying upon his stomach upon a sled, who was run over by a car and instantly killed, *held*, guilty of contributory negligence, as a matter of law. *Flintoff v. Muskegon Traction & Lighting Co.*, 527.
3. Age is not the true test as to whether a child is guilty of contributory negligence; it is the intelligence, and not the age, that must control. *Id.*
4. Where the evidence as to the manner in which the injury occurred was in conflict, the trial court very properly submitted the questions of gross negligence, and of discovered negligence to the jury. *Id.*

See CARRIERS (1, 5, 8).

STREETS—See EVIDENCE (6); MUNICIPAL CORPORATIONS (5, 6).

SUBCONTRACTORS—See PRINCIPAL AND SURETY (1, 4).

SUBROGATION.

1. A principle which lies at the bottom of the doctrine of subrogation is that a person seeking it must have paid the debt under grave necessity to save himself a loss; the right never being accorded to a volunteer. *Parks v. Sherman*, 697.
2. Where plaintiff volunteered to pay the debt of a lodge to relieve a member who was holden therefor, expecting that a note signed by several members and secured by a trust deed given by defendant would be accepted by the bank next day, and the money repaid him, but the bank refused to make the loan and the money was never repaid, *held*, that plaintiff had no right of subrogation to the trust deed, since neither plaintiff nor defendant were under

SUBROGATION—Continued.

obligation to pay the debt, and plaintiff was merely a volunteer. *Id.*

3. Since equity follows the law, the equitable doctrine of subrogation must be applied with due regard to both the legal and equitable rights of others. *Id.*

SUBROGATION OF INSURER TO JUDGMENT AGAINST WRONGDOER—See INSURANCE (6).

SUBSTITUTED SERVICE—See PROCESS (1).

SUFFICIENCY OF CREW IN CHARGE OF SAWMILL—See MASTER AND SERVANT (2).

SUMMARY PROCEEDINGS—See LANDLORD AND TENANT (1); PROCESS (1).

SUPPORT AND MAINTENANCE—See DEEDS (3).

SUPREME COURT RULE—See APPEAL AND ERROR (35).

SURETY—See PRINCIPAL AND SURETY.

TAXATION.

1. Before the court is justified in holding a tax to be illegal because the assessing officers acted fraudulently, that fact should be clearly shown by the evidence; an error of judgment by the officers in their valuations of property being insufficient. *Copper Range Co. v. Adams Township*, 209.
2. In an action by a mining company against a township to recover a portion of taxes claimed to have been excessive, and paid under protest, the finding of the court below that it was unable to find in the action of any of the assessing officers, whose action is questioned, or of the board of tax commissioners, any evidence of fraud or unfairness or of any effort to shift taxation from one mining property to another, *held*, justified by the record. *Id.*
3. Lessor's income tax, as applied to leased property, *held*, not a tax "levied upon said premises," but in its process and assessment a direct personal tax against him. *Park Building Co. v. George P. Yost Fur Co.*, 349.
4. Where a tax title purchaser went into possession without giving a notice to redeem that complied with the provisions of Act No. 229, Pub. Acts 1897 (1 Comp. Laws 1915, § 4138 *et seq.*), the notice given by him was void and of no effect, and he was a trespasser from the beginning, and therefore not entitled to recover for his improvements. *McBride v. Olosser*, 398.
5. Said act, being a beneficent one, must be recognized by courts of equity as well as law, and therefore equity will not restrain ejectment brought by the owner. *Id.*

TAXATION—Continued.

6. Statutory proceedings which divest the owner of his property must substantially comply with the provisions of the statute, and where a tax-title buyer failed to give the statutory notice to redeem, his title was void, and the defect was not waived by oral statements of the owner that he did not intend to redeem, since the title to real estate does not rest in parol, and is not acquired or lost by casual conversations. *Id.*

See LANDLORD AND TENANT (4); MUNICIPAL CORPORATIONS (5, 6).

TAXATION OF PRIVATE PERSONALTY ON CEDED TERRITORY—See STATES (2).**TAXING TERM FEE ON POSTPONEMENT—See COSTS (1).****TAXPAYER'S INTEREST TO RESTRAIN ILLEGAL ACQUISITION OF PUBLIC UTILITY—See MUNICIPAL CORPORATIONS (15).****TAX SALES—See TAXATION (4).****TENANT'S COVENANT TO PAY TAXES DOES NOT INCLUDE LESSOR'S INCOME TAX—See LANDLORD AND TENANT (4).****TENDER OF AMOUNT DUE—See LANDLORD AND TENANT (1).****THEORY OF DEFENSE—See CARRIERS (6).****TIME—See PROCESS (1).****TIME OF APPEAL—See APPEAL AND ERROR (13); CIRCUIT COURT COMMISSIONERS.****TIME OF PAYMENT—See SALES (4).****TIME OF PERFECTING APPEAL—See APPEAL AND ERROR (35).****TOWNSHIPS—See MUNICIPAL CORPORATIONS (1).****TRANSACTIONS BETWEEN OFFICERS AND DIRECTORS—See CORPORATIONS (3).****TRESPASS TO LANDS—See JUSTICES OF THE PEACE.****TRIAL.**

1. Where defendant submitted no proof as to the cost of a certain item of work which he had a right to charge to plaintiff's account, the trial court was not in error in withdrawing same from the consideration of the jury. *People, for Use of Ryan, v. Boyes*, 58.
2. Although plaintiff's counsel, in his argument to the jury, discussed matters which the court later in his charge withheld from their consideration, this court will assume that the jury realized it was their duty to be governed by the instructions of the court as to the law and not by

TRIAL—Continued.

the argument of counsel, where it appears that defendant was not prejudiced. *Rice v. Michigan R. Co.*, 125.

3. A remark by counsel for plaintiff that he would stipulate that witness for defendant, who was with difficulty giving testimony through an interpreter, would say what counsel for defendant wanted her to say, where, upon objection, the trial judge instructed the jury to pay no attention to the remark, in view of uncertainty in the appellate court as to the intended and accepted meaning of the remark, and the manner in which it was treated by the trial judge, *held*, not reversible error. *Gagush v. Hoeft*, 147.
4. In an action for breach of marriage promise, where plaintiff's damages were aggravated by her seduction, her counsel did not exceed the limits of proper argument in stating to the jury that he was impressed, and that he thought the jury ought to be, that upon the record plaintiff was shown to be a virtuous woman, where his expressed opinion was based upon testimony. *Id.*
5. It was error for the court to refuse to counsel the right to comment in his argument upon certain alleged contradictions in the testimony given upon the former and upon this trial without producing a transcript of the testimony given upon the last trial or having the reporter read what was desired from his notes. *Id.*
6. The argument to the jury should be based on the testimony submitted at the trial. *Id.* 148.
7. Counsel had the right during the new trial to interrogate witnesses as to the testimony given by them on the former trial, either from a transcript of such testimony, or from notes taken by him, or from his personal recollection of what they then testified to, and if the witnesses admitted the giving of such testimony and it is contradictory, counsel may comment on it in his argument to the jury without producing a transcript, or he may submit to the jury his recollection of the questions asked and answers given, and he should not be prevented from doing so, unless on objection, the trial judge is convinced that counsel is mistaken in his statement of such testimony. *Id.*
8. It is not for the trial court to intimate that an interested witness might not be truthful and accurate, or to express an opinion as to which witness was entitled to credence, in his instructions to the jury, where the conflict in testimony was very sharp. *Vinton v. Township of Plainfield*, 180.
9. Where the jury returned for further instructions, after having been out for a long time, the court was not in error in instructing them that it was desirable for them to reach an agreement if they could do so without vio-

TRIAL—Continued.

- lating their convictions and judgments, that they should reason together and it was just possible they might arrive at a verdict. *Id.*
10. Where the case was full of conflicting testimony upon the controlling facts, *held*, that it was properly submitted to the jury. *Id.*
 11. In ejectment, where the question of defendant's pedigree was involved, argument by her counsel that plaintiff was seeking to "bastardize this girl," and that her good name was involved, *held*, not reversible error, where the trial court sustained plaintiff's objections, and stated that defendant's legitimacy was not involved, but only the question as to whether the alleged father and mother were her parents. *Livernash v. DeLorme*, 296.
 12. Where plaintiff's counsel asked him if he had any children, stating that the question was asked in view of defendant's claim that he had chronic venereal disease, and the court declined to receive the answer, *held*, not error, where there is nothing to indicate that counsel did not act in good faith, and the fact that plaintiff had children had already been testified to without objection. *Wilson v. Detroit United Railway*, 411.
 13. Where clinical reports of a hospital giving certain data of plaintiff's physical condition were received in evidence, and the person making such entries was not called as a witness, but the senior surgeon who signed them testified that while some of the facts stated therein were within his personal knowledge, others were not, and on cross-examination stated that "clinical records are not infallible by a long ways; they are frequently wrong, I will say," and many of the facts found in said reports were denied by plaintiff, the trial court was not in error in instructing the jury: "As to these hospital records, they have been received in evidence in this case. Their probative effect, that is, how much of them you believe, or how much of them you disbelieve, is left solely as a question for your determination." *Id.* 412.
 14. In an action on a mutual benefit policy, claimed by the defendant association to be forfeited for nonpayment of dues, the use by the trial judge of the word "abhor," in explaining to the jury that forfeitures are not favored either at law or in equity, while unfortunate, *held*, not reversible error where the charge as a whole fully protected the rights of defendant. *Clifford v. Catholic Mutual Benefit Ass'n*, 448.
 15. In an action to recover a balance claimed to be due on a building contract, where the amount of the contract was in dispute, it was not error for the trial court to use the expression "was in the neighborhood of \$5,100," in charging the jury in reference thereto, it appearing from

TRIAL—Continued.

- a reading of the whole sentence that the court was stating the claims of the respective parties and clearly presenting the issue to the jury. *Michaels v. Pinten*, 455.
16. In such action, where the fact that the plaintiff had had years of experience as a contractor and builder was a circumstance already before the jury, the trial court was not in error in refusing to call the attention of the jury especially to it. *Id.*
 17. Where plaintiff had testified, in support of his theory that the contract price was greater than defendant claimed, as to the cost and expense of erecting such a building, testimony of defendant and his wife, in rebuttal, that the building was leaky, was admissible on the theory that defective work did not cost as much as careful and satisfactory work. *Id.*
 18. Where the substance of requests to charge was given in the general charge, there was no error in refusing such requests. *O'Dell v. Strath*, 497.
 19. In an action by a firm of architects for services in preparing plans and specifications for the construction of a building which was never erected because of difficulty in financing same, testimony of defendant as to an interview with a former member of plaintiff firm, who is not a party to the suit, in so far as it related to the terms of the contract which was afterwards entered into, *held*, properly stricken out. *Id.*
 20. Asking a question of defendant's wife, on cross-examination, as to whether she had given the matter a great deal of thought during the past week in order to help win the case for her husband, which was withdrawn, on objection, *held*, not reversible error. *Id.* 498.
 21. Where plaintiffs sued for \$6,000 and offered testimony that their services were worth that sum, but they had rendered a bill to the defendant of \$3,000, a verdict for \$2,500 cannot be said to be a compromise verdict, there being nothing to indicate that the jury did any "splitting of differences." *Id.*
 22. Under 3 Comp. Laws 1915, § 12625, when the jury disagrees and is discharged, that trial is ended, and the parties are entitled to another jury trial. *Graves v. Township of Dorr*, 558.

See APPEAL AND ERROR (5-7, 12, 28, 29); BROKERS (4); CARRIERS (3, 6-8, 15); CRIMINAL LAW (2, 3, 5, 7-12); EVIDENCE (5); INTOXICATING LIQUORS (1, 5); MUNICIPAL CORPORATIONS (3).

TRUST DEED AS SECURITY FOR LOAN NEVER MADE—See MORTGAGES (5).

TRUSTS.

1. Passive trusts are abolished by statute in this State, but where a deed is so worded as to create a passive or naked trust, the statute on uses and trusts (3 Comp. Laws 1915, § 11565 *et seq.*) executes it by forthwith passing the title to the beneficiary. *Woolfitt v. Histed*, 308.
2. If the beneficiary in a deed attempting to create a passive trust was dead at the time it was executed, said deed was void and the title remained in the grantor. *Id.*
3. In a deed from a father to his son, the words designating him as "trustee for Katherine Smith of Chicago, Illinois," held, to import an intent on the part of the grantor to invest her with some beneficial interest in the property conveyed. *Id.*
4. Written acknowledgment of said trust by the grantee supplements and confirms said deed, and satisfies the statute of frauds by the harmonious evidence in writing from both grantor and grantee of a passive or naked trust, which the statute executes by placing the legal estate in the beneficiary if then living. *Id.*

See CORPORATIONS (1, 2).

UNDUE INFLUENCE—See DEEDS (3).

UNIFORM SALES ACT—See SALES (1, 4).

UNJUST DISCRIMINATION—See CARRIERS (11, 14, 15); COMMERCE (3).

URGING JURY TO REACH VERDICT—See TRIAL (9).

USE OF BACK YARD—See LANDLORD AND TENANT (6).

USES, STATUTE OF—See TRUSTS (1).

USURY.

In proceedings to foreclose a real estate mortgage, where the notes given therewith included a ten per cent. bonus in addition to the amount actually loaned, and also provided for seven per cent. interest, the highest legal rate, the same were usurious under 2 Comp. Laws 1915, § 5998, and the assignee thereof with notice was not entitled to receive any interest thereon, and it is unimportant whether the mortgagee or her husband, who acted as her agent in negotiating the loan, received the ten per cent. bonus. *Umphrey v. Auyer*, 276.

UTILITY—See WORDS AND PHRASES.

VALUATION OF PROPERTY—See TAXATION (1).

VALUED POLICY—See INSURANCE (6).

VENDOR AND PURCHASER—See FRAUD (3); FRAUDULENT CONVEYANCES (2).

VERDICT APPORTIONING DAMAGES—See DEATH ACT (2).

VERDICT FOR LESS THAN AMOUNT ASKED—See TRIAL (21).

VOIDING POLICY—See INSURANCE (1).

VOLUNTEER—See SUBROGATION (1, 2).

WAIVER.

1. Waiver implies the abandonment of a right by a person entitled to exercise it, who has at the time full knowledge of the existence of the fact on which the right depends, and such knowledge and the intention to relinquish the right must concur. *Dow Chemical Co. v. Detroit Chemical Works*, 157.
2. Although, under the contract, payment for an installment became due on February 1st and vendor made another shipment on February 3d, without having received payment for previous shipment, said action cannot be said to be a waiver of its right to rescind, since payment might have been in the mails, and vendor, at the time of the alleged waiver, had no definite knowledge of the default. *Id.* 158.

See COURTS; EVIDENCE (5); TAXATION (6).

WATERWORKS—See MUNICIPAL CORPORATIONS (13, 14).

WEIGHT OF EVIDENCE—See APPEAL AND ERROR (18); NEW TRIAL (4, 9); PRINCIPAL AND SURETY (4).

WITHDRAWAL OF QUESTION—See TRIAL (20).

WITHHOLDING SECRET INFORMATION—See CORPORATIONS (8, 9).

WITNESSES.

Where a witness had testified that defendant grew up in a certain community and was always known by the name of her alleged parents, it was not error to allow, on cross-examination, questions as to whether she was known as their daughter, and as to whether they held her out as their daughter. *Livernash v. DeLorme*, 296.

See EVIDENCE (4); NEW TRIAL (3).

WORDS AND PHRASES.

"Utility" means the state or quality of being useful; a "public utility" is one useful to the public. *Schurtz v. City of Grand Rapids*, 510.

WORKMEN'S COMPENSATION ACT—See MASTER AND SERVANT (7-9).

WORKMEN'S COMPENSATION ACT, DEFENSES NOT AVAILABLE WHERE MASTER NOT UNDER—See MASTER AND SERVANT (4).

WRIT OF RESTITUTION—See CIRCUIT COURT COMMISSIONERS.

WRITTEN ACKNOWLEDGMENT OF TRUST BY GRANTEE—
See TRUSTS (4).

WRITTEN CONTRACTS—See EVIDENCE (1).

WRITTEN LEASE—See EVIDENCE (11).

E. B. B.
2/17/21

